(92)

No. 98-1701-CFX Title: United States, Petitioner
v.
Gary Locke, Governor of Washington, et al.

Docketed: April 23, 1999 Court: United States Court of Appeals for the Ninth Circuit

Vide:
98-1706

Entry	Date	Proceedings and Orders
	Feb 11 1999	Application (98A669) to extend the time to file a petition for a writ of certiorari from February 22, 1999 to April 23, 1999, submitted to Justice O'Connor.
	Feb 12 1999	Application (98A669) granted by Justice O'Connor extending the time to file until March 24, 1999.
	Mar 12 1999	Application (98A669) to extend further the time to file a petition for a writ of certiorari from March 24, 1999 to April 23, 1999, submitted to Justice O'Connor.
	Mar 15 1999	Application (98A669) granted by Justice O'Connor extending the time to file until April 23, 1999.
	Apr 23 1999	Petition for writ of certiorari filed. (Response due June 28, 1999)
	Apr 23 1999	Appendix of petitioner United States filed.
	May 13 1999	Waiver of right of respondent International Association of Independent Tanker Owners to respond filed.
	May 13 1999	Order extending time to file response to petition until June 28, 1999.
	May 13 1999	This extension is granted for all respondents.
	Jun 25 1999	Brief amicus curiae of Pacific Merchant Shipping Association filed. VIDED.
	Jun 28 1999	Brief of respondent - Intervenors in opposition filed. VIDED.
	Jun 28 1999	Brief of respondents Gary Locke, Governor of Washington, et al. in opposition filed. VIDED.
	Jun 28 1999	Appendix of respondents Gary Locke, Governor of Washington, et al. filed. VIDED.
	Jun 28 1999	Brief amicus curiae of Maritime Law Association of the United States filed. VIDED.
	Jul 21 1999	DISTRIBUTED. September 27, 1999
	Jul 23 1999	Reply brief of petitioner United States filed.
	Sep 10 1999	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, October 22, 1999. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 19, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 30, 1999. Rule 29.2 does not apply. The cases are consolidated and a total of on hour is allotted for oral argument. SET FOR ARGUMENT December 7, 1999. **********
	Oct 21 1999	Joint appendix filed. VIDED.

No. 98-1701-CFX

Entry	Date	Proceedings and Orders
	Oct 21 1999	Brief amici curiae of Baltic and International Maritime Council, et al. filed. VIDED.
	Oct 22 1999	Motion of Solicitor General for divided argument filed.
	Oct 22 1999	Brief amici curiae of Belgium, et al. filed. VIDED.
	Oct 22 1999	Brief amici curiae of Product Liability Advisory Council, Inc., et al. filed. VIDED.
	Oct 22 1999	Brief amici curiae of National Association of Waterfront Employers, et al. filed. VIDED.
	Oct 22 1999	Brief amicus curiae of Maritime Law Association of the United States filed. VIDED.
	Oct 22 1999	Brief amicus curiae of American Waterways Operators filed. VIDED.
	Oct 22 1999	Brief amici curiae of International Chamber of Shipping, et al. filed. VIDED.
	Oct 22 1999	Brief amici curiae of Puget Sound Steamship Operators Association, et al. filed. VIDED.
	Oct 22 1999	Brief amicus curiae of Steamship Association of Southern California filed. VIDED.
	Oct 22 1999	Brief amicus curiae of Pacific Merchant Shipping Association filed. VIDED.
	Oct 22 1999	Brief amicus curiae of Canada filed. VIDED.
	Oct 22 1999	LODGING consisting of twelve copies of the 1994 Marine Study and Marine Environmental Protection Comparability Analysis submitted by counsel for amicus Canada.
	Oct 22 1999	Brief of petitioner United States (TBP) filed. VIDED.
	Oct 22 1999	Brief of petitioner Internation Association of Independent Tank Owners filed. VIDED.
	Oct 22 1999	Brief of petitioner United States filed.
	Oct 28 1999	LODGING consisting of fourteen sets of a four volume compendium of statutes, treaties and regulations submitted by the Solicitor General.
	Nov 4 1999	CIRCULATED.
	Nov 18 1999	Brief amici curiae of Alaska, et al. filed.
	Nov 19 1999	Brief of respondents Washington Environmental Council, et al. filed. VIDED.
	Nov 19 1999	Brief of respondents Gary Locke, Governor of Washington, et al. filed. VIDED.
	Nov 19 1999	Brief amicus curiae of Prince William Sound Regional Citizens' Advisory Council filed. VIDED.
	Nov 19 1999	Brief amici curiae of pacific Coast Federation of Fishermens Associations, et al. filed. VIDED.
	Nov 19 1999	Brief amici curiae of Washington Counties of San Juan, et al. filed.
	Nov 22 1999	Motion of respondent/intervenor for divided argument filed.
	Nov 22 1999	Record filed.
	Nov 23 1999	DISTRIBUTED. Motion of the Solicitor General for divided argument (November 24, 1999).
	Nov 23 1999	DISTRIBUTED. Motion of respondent-intervenors for divided argument (November 24, 1999).
	Nov 23 1999	Motion of Pierce, Mason, and Skagit Counties to join brief amici curiae of Washington Counties of San Juan, et al. filed.
	Nov 24 1999	Motion of Solicitor General for divided argument GRANTED.
	Nov 24 1999	Motion of respondent/intervenor for divided argument DENIED.
	Nov 29 1999	Reply brief of petitioner Intertanko filed. VIDED.
	Nov 30 1999	Reply brief of petitioner United States filed. VIDED.
	Nov 30 1999	Record filed.
	Dec 6 1999	Motion of Pierce, Mason, and Skagit Counties to join brief amici curiae of Washington Counties of San Juan, et al. DENIED.
	Dec 7 1999	ARGUED.

Supreme Court, U.S.
FILED

(1)

98 1701 APR 23 1999

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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3 CP

QUESTION PRESENTED

Whether regulations adopted by the State of Washington governing staffing and operation of ocean-going oil tankers engaged in coastal and international commerce are preempted to the extent that they conflict with international obligations of the United States and Coast Guard regulations for such tankers promulgated pursuant to federal statutes and international conventions and agreements.

PARTIES TO THE PROCEEDING

The petitioner in this proceeding is the United States of America, which intervened in the case below. The case was originally brought by the International Association of Independent Tanker Owners (Intertanko) against various Washington State officials responsible for the promulgation and enforcement of the Washington regulations at issue here. Those officials are: Gary Locke, Governor of the State of Washington; Christine O. Gregoire, Attorney General of the State of Washington; Barbara J. Herman, Administrator of the State of Washington, Office of Marine Safety; David MacEachern, Prosecutor of Whatcom County; K. Carl Long, Prosecutor of Skagit County; James H. Krider, Prosecutor of Snohomish County; and Norman Maleng, Prosecutor of King County. The Natural Resources Defense Council, Washington Environmental Council, and Ocean Advocates intervened in the district court.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

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UNITED STATES OF AMERICA, PETITIONER

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GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-35a)[1] is reported at 148 F.3d 1053. The court's order denying rehearing (App. 36a-54a) is reported at 159 F.3d 1220. The opinion of the district court (App. 55a-89a) is reported at 947 F. Supp. 1484.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1998. A petition for rehearing was denied on November 24, 1998. App. 37a. On February 12, 1999, Justice O'Connor granted an extension of time in which to file a petition for a writ of certiorari to and including March 24, 1999, and on March 15, 1999, further ex-

[1] "App." refers to the separately bound appendix to the petition for a writ of certiorari.

tended the time in which to file to and including April 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the United States Constitution, Ports and Waterways Safety Act of 1972, Oil Pollution Act of 1990, Coast Guard regulations, and Washington State regulations are set forth in the appendix, at 90a-117a.

STATEMENT

This case concerns the validity of a regulatory scheme adopted by the State of Washington that seeks to govern the equipment, design, staffing, and operation of oil tankers engaged in interstate and foreign commerce. The Washington regulations, which apply to all ships (including foreign-flag vessels) that transport oil through territorial waters, differ from the comprehensive national and international standards developed for the same purpose. Those standards have been codified in international conventions formally ratified by the United States, other agreements with foreign nations, various Acts of Congress, and implementing regulations promulgated by the Secretary of Transportation through the Coast Guard.

1. a. The United States, through the Coast Guard and other federal agencies (such as the Departments of State and Defense, the Environmental Protection Agency, and the National Oceanic and Atmospheric Administration), is a leader in the development of consensual international standards establishing uniform requirements for oil tankers, as well as other vessels. See S. Treaty Doc. No. 39, 103d Cong., 2d Sess. at III (1994) ("The United States has basic and enduring

national interests in the oceans and has consistently taken the view that the full range of these interests is best protected through a widely accepted international framework governing uses of the sea."). The international regime, embodied in numerous conventions ratified by the United States, depends upon the principle of reciprocity: all signatory nations are assured of a ship's compliance with international standards through the certification of the ship by the government of its own flag nation, and that certification is then respected by the other signatory nations, including the United States.[2]

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[2] See International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention), July 7, 1978, Int'l Maritime Org., Doc. Sales No. IMO-945E (1996) (entered into force April 28, 1984), as amended by the Seafarers' Training, Certification and Watchkeeping (STCW) Code, July 7, 1995, Int'l Maritime Org., Doc. Sales No. IMO-945E (1996), which is implemented domestically by the Coast Guard pursuant to Subtitle II, 46 U.S.C. 2101 *et seq.*; International Convention for the Safety of Life at Sea (SOLAS Convention), Nov. 1, 1974, 32 U.S.T. 47 (entered into force May 25, 1980), as amended, and the Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, Feb. 17, 1978, 32 U.S.T. 5577, as amended through July 1, 1997, Int'l Maritime Org., Doc. Sales No. IMO-110E (1997), which is implemented by the Coast Guard pursuant to Executive Order No. 12,234, 3 C.F.R. 277 (1981); International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code), Nov. 4, 1993, Res. A.741(18), Int'l Maritime Org., Doc. Sales No. IMO-186E (1994); see also Resolutions of the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, May 24, 1994, Int'l Maritime Org., Doc. Sales No. IMO-110E (1997) (entered into force July 1, 1998) (making ISM Code mandatory), and Guidelines on Implementation of the International Safety Management Code by Administrators, Nov. 23, 1995, Res. A.788 (19), Int'l Maritime Org., Doc. Sales No. IMO-117E (1995) (to assist in uniform implementation by administrators), ratified by the United States in 1995, and implemented by

Congress has enacted numerous federal statutes that furnish a means to implement the United States' treaty obligations, codify in domestic law the international system of tanker regulation, and confirm the United States' leadership in developing international rules for tanker safety. See, *e.g.*, H.R. Rep. No. 1384, 95th Cong., 2d Sess. Pt. 1, at 6-9 (1978).[3] Many of the statutory provisions in turn direct the Secretary of Transportation (who has delegated that authority to the Coast Guard, 49 C.F.R. 1.46 (b) and (c)) to establish the applicable standards.

Of particular relevance here, in a statutory provision drawn from Title II of the Ports and Waterways Safety

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the Coast Guard pursuant to 46 U.S.C. 3201-3205 (Supp. II 1996); International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), Nov. 2, 1973, Int'l Maritime Org., Doc. Sales No. IMO-520E (1997), as amended by the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, Int'l Maritime Org., Doc. Sales No. IMO-520E (1997), implemented by the Coast Guard pursuant to 33 U.S.C. 1901-1915 (1994 & Supp. III 1997); Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (CVTMS Agreement), Dec. 19, 1979, U.S.-Can., 32 U.S.T. 377 (entered into force Dec. 19, 1979); United Nations Convention on the Law of the Sea (UNCLOS), Dec. 10, 1982, U.N. Div. for Ocean Affairs & Law of the Sea Office of Legal Affairs, U.N. Sales No. E.97.v.10 (1997), which has not yet been ratified by the United States, but which, pursuant to the President's Ocean Policy Statement, 19 Weekly Comp. Pres. Doc. 383 (Mar. 10, 1983), is recognized by the United States to reflect customary international law to which the United States adheres.

[3] Those statutes include the Tank Vessel Act, ch. 729, 49 Stat. 1889; Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424; Act to Prevent Pollution from Ships, Pub. L. No. 96-478, 94 Stat. 2297; Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471; and Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484. (Those Acts, as amended, are codified in various parts of Titles 33 and 46 of the United States Code.).

Act of 1972 (PWSA), Congress has broadly directed the Secretary to "prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning" of tank vessels "that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." 46 U.S.C. 3703(a). In developing those standards, the Secretary must consult with and consider the views of interested federal agencies, "officials of State and local governments," "representatives of port and harbor authorities and associations," "representatives of environmental groups," and "other interested parties knowledgeable or experienced in dealing with problems involving vessel safety, port and waterways safety, and protection of the marine environment." 46 U.S.C. 3703(c). A tank vessel of the United States must have a certificate of inspection issued by the Secretary endorsed to indicate that the vessel complies with federal regulations. 46 U.S.C. 3710(a). Consistent with the role those regulations play in implementing the international regime, however, Congress has provided that with respect to foreign flag tank vessels, the Secretary may accept a certificate issued by the government of a foreign country under a treaty, convention, or other international agreement to which the United States is a party, as a basis for issuing a certificate of compliance with federal standards. 46 U.S.C. 3711(a). See also 33 U.S.C. 1221-1236 (complementary provisions under Title I of the PWSA).[4]

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[4] See 33 U.S.C. 1228 (vessel may not operate in United States waters unless it meets applicable licensing standards); 33 U.S.C. 1231 (rulemaking procedures providing for consultation similar to that under 46 U.S.C. 3703(c)); 60 Fed. Reg. 24,767 (1995) ("The Coast Guard is modifying its regulations on navigational safety and

Because the United States is both a "flag state" (meaning that it is responsible for developing standards and regulations for ships flying the U.S. flag) and a "port state" (meaning that U.S. ports receive cargo, and oil in particular, arriving on foreign-flag vessels), the United States has a substantial interest in ensuring that all vessels that transit its waters, particularly foreign-flag vessels, comply with comprehensive safety and environmental protection standards. The International Convention for the Safety of Life at Sea (SOLAS Convention), Nov. 1, 1974, 32 U.S.T. 47, establishes that every ship, when in a port of another signatory nation, is "subject to control by officers duly authorized by [the port nation] Government in so far as this control is directed towards verifying that the certificates issued under [the Convention] are valid." Annex, Ch. I, Pt. B, Reg. 19(a), Int'l Maritime Org., Doc. Sales No. IMO-110E (1997). But the SOLAS Convention, like other conventions at issue in this case, requires port nations to accept valid certificates (issued by the flag nation government) unless there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the conditions for which the certificate was issued. *Id.* at 19(b).[5] If control is exercised and a ship is unduly

marine engineering to harmonize them with the International Convention for the Safety of Life at Sea.").

[5] The requirements of certification and reciprocity also apply in the context of rules established pursuant to other international agreements. See STCW Convention, Arts. VI (certificates), X (control); MARPOL 73/78, Arts. 5-7; *id.* at Annex I, Ch. I, Regs. 5 (issue of certificates), 7 (form of certificate), 8A (port state control on operational requirements); SOLAS Convention, Annex, Ch. IX, Regs. 4 (certification), 6 (verification and control), Int'l Maritime Org., Doc. Sales No. IMO-110E (1997); *id.* Ch. XI, Reg. 4 (port state control on operational requirements).

detained or delayed, the port nation government is responsible for compensation for any loss or damage suffered by the ship. *Id.* at 19(f). Chapter I of the SOLAS Convention provides that foreign ships are subject to control only by officers duly authorized by the national government that is the signatory to the Convention. Pursuant to Executive Order No. 12,234 (see 3 C.F.R. 277 (1981)), which implements the SOLAS Convention, and the Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, § 602, 110 Stat. 3927, Coast Guard employees are duly authorized officers who may subject foreign vessels to control in U.S. ports under that Convention. Officials of Washington and other States are not.

b. In *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), this Court addressed whether Washington State regulations applicable to tankers were preempted by various provisions of federal law, specifically including regulations issued under one of the Acts of Congress—the Ports and Waterways Safety Act of 1972 (PWSA)—that is at issue in this case. In holding that the State's attempts to regulate the design of oil tankers were preempted, the Court concluded that, in Title II of the PWSA, 46 U.S.C. 391a (Supp. V 1975) (now codified as amended at 46 U.S.C. 3701 *et seq.*), Congress "has entrusted to the Secretary [of Transportation] the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States." 435 U.S. at 163. The Court noted that "Congress expressed a preference for international action and expressly anticipated that foreign vessels would or could be considered sufficiently safe for certification by the Secretary if they satisfied the requirements arrived at by treaty or convention." *Id.* at 168. With respect to personnel, staffing, and operational requirements, the Court concluded that Washington's

regulations were not automatically preempted by Title I of the PWSA, 33 U.S.C. 1221-1227 (Supp. V 1975) (now codified as amended at 33 U.S.C. 1221-1231), in the absence of federal regulations addressing the same subject matter. 435 U.S. at 171. But the Court emphasized that if the Coast Guard adopts regulatory requirements governing a particular subject (or concludes that no such requirements should be adopted at all), a State's inconsistent rules are ousted by operation of the Supremacy Clause. *Id.* at 171-172; see *id.* at 173-178 (invalidating Washington statute excluding from Puget Sound all tankers in excess of 125,000 deadweight tons because it differed from a Coast Guard rule).

c. After the *Exxon Valdez* oil spill in Alaska in 1989, Congress enacted the Oil Pollution Act of 1990 (OPA), Pub. L. No. 101-380, 104 Stat. 484. Title I of OPA sets federal standards for liability and damages for the discharge of oil into navigable waters of the United States. 104 Stat. 486-506. Subtitle A of Title IV—which concerns oil-spill prevention—addresses certain discrete issues relating to tanker personnel qualifications, manning, operations, design, and construction, and it does so in part by strengthening (or directing the exercise of) certain powers the Secretary already had under prior law. 104 Stat. 509-523. In that Subtitle, Congress required a design and construction standard that differed from international ones in only one respect, by mandating double hulls for certain types of tank vessels that operate in U.S. waters regardless of their flags (46 U.S.C. 3703a(a)), with an exception for vessels transiting through the territorial waters of the United States in innocent passage (46 U.S.C. 3702(e)). See OPA § 4115, 104 Stat. 517.[6] In all other respects,

[6] Similarly, in Title I, Congress required certain vessels to obtain Certificates of Financial Responsibility that provide more expansive coverage and higher limits than are required under the international regime. OPA §§ 1004(a)(1) and (d), 1016, 104 Stat. 492, 493, 502 (codified at 33 U.S.C. 2704(a)(1) and (d), 2716 (1994 & Supp. III 1997)).

Subtitle A is consistent with international standards. See, *e.g.*, OPA § 4106(a) and (b), 104 Stat. 513-514 (directing the Secretary to "evaluate the manning, training, qualification, and watchkeeping standards of a foreign country that issues documents" for covered tankers to ensure that they "are at least equivalent to United States law or international standards accepted by the United States").

d. In 1994, Washington adopted new regulatory requirements, which it called "Best Available Protection" (BAP) Regulations. Those rules were designed to impose more stringent safety requirements on tankers, and thereby prevent oil spills. In pertinent part, those rules require installation of specified navigational and emergency towing equipment; impose reporting requirements for certain vessel casualties regardless of whether they occur in Washington waters; mandate particular language-proficiency requirements and personnel qualifications for vessel officers and crews; establish maximum crew work hours; set drug-testing policies; and impose position-monitoring requirements. See App. 57a-60a (describing the provisions). Washington's regulations concerning personnel, management, and operation of vessels depart from the federal and international regulatory regime in numerous ways. See, *e.g.*, pages 17-20, *infra*.

2. The International Association of Independent Tanker Owners (Intertanko) brought this suit for declaratory and injunctive relief against Washington state and local officials responsible for enforcing the BAP regulations. The district court granted Washing-

ton's motion for summary judgment and denied Intertanko's motion. App. 55a-89a. The district court recognized that "[a]lthough protection of the marine environment has historically been within the reach of the police powers of the state, shipping has traditionally been governed by federal law." App. 61a. The court also had "no doubt that the areas addressed by the Washington oil spill prevention rules, which generally cover tanker operations, personnel, management, technology, and information reporting, are also comprehensively regulated by federal statutes, regulations and treaty obligations." App. 69a. The court nevertheless sustained all of the Washington regulations.

The court relied principally on Section 1018 of OPA, which provides that "[n]othing in this Act" shall affect or preempt the authority of a State to impose "any additional liability or requirements with respect to * * * the discharge of oil or other pollution by oil within such State," or "additional liability or additional requirements * * * relating to the discharge, or substantial threat of a discharge, of oil." 33 U.S.C. 2718(a) and (c). The court concluded that, since Title IV of OPA contains some provisions addressing tanker operations, personnel management, technology, and information reporting, the effect of Section 1018 is that there is no preemption of state laws that are inconsistent with the federal regulatory regime, even though that regime rests on Acts of Congress other than OPA. App. 69a. The court also found the inconsistency between the Washington rules and the international regime of maritime regulation implemented by federal law to be immaterial, since Congress had departed from the international regime in OPA by mandating a requirement of a double hull on oil tankers—a step that, the court opined, "demonstrates that Congress was not

overly concerned with maintaining uniformity with such standards." App. 66a.

The court also engaged in a separate "implied preemption" analysis, and determined that although Congress has occupied the field of regulating oil tanker design and construction, it has not done so in other areas in which a State might exercise its police powers to protect the environment. App. 69a-76a. Although the district court recognized that in *Ray* this Court had held that Coast Guard regulations issued under the PWSA preempt state laws in those other areas of tanker regulation as well, App. 70a-72a, the court concluded that Section 1018 of OPA required a different result here, notwithstanding the Coast Guard's expression of intent to preempt state laws, App. 76a-77a.[7]

3. The United States intervened after Intertanko appealed the district court's decision to the Ninth Circuit. The Ninth Circuit affirmed in part and reversed in part. App. 1a-35a. The court held that several Washington regulations requiring tank vessels to have certain navigation and towing equipment are preempted, App. 26a-29a, and that state regulations imposing requirements with respect to staffing, personnel training, qualifications, and operation of tank vessels are not preempted, even where they depart from standards set in international agreements and Coast Guard regulations, App. 7a- 25a.

Like the district court, the court of appeals relied primarily on Section 1018 of OPA. The court of appeals

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[7] The district court also rejected Intertanko's contention that the Washington regulatory program violates the Commerce Clause and the foreign affairs powers of the United States Government. App. 81a-86a. The court of appeals likewise rejected those contentions, App. 32a-35a, and they are not involved in this petition.

recognized that OPA is not the only federal statute that regulates tanker vessels, noting that the PWSA, the Port and Tanker Safety Act of 1978, and the Tank Vessel Act of 1936 do so as well. App. 11a. The court of appeals rejected Washington's contention that Section 1018 of OPA, which provides that "this Act" shall not have preemptive effect, also applies to those other federal statutes. The court found that interpretation inconsistent with the "plain meaning" of Section 1018. *Ibid.* The court nevertheless held that the Washington regulations governing staffing, personnel training and qualifications, and operation of tank vessels are not preempted by Coast Guard regulations issued under those other federal statutes. App. 13a-19a. The court reasoned that OPA, "[a]s the most recent federal statute in the field, * * * reflects the full purposes and objectives of Congress, better than [the other statutes governing tankers], all of which [OPA] was designed to complement." App. 16a (internal quotation marks, citation, and emphasis omitted). In the court's view, Section 1018 of OPA "demonstrates Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability, and compensation." *Ibid.*

Next, the court of appeals rejected the contention that the challenged state rules are invalid because they conflict with various international agreements governing tankers. The court found that Congress had not embraced strict international uniformity because the relevant treaties set only minimum standards, and each signatory nation can impose higher standards. App. 17a-18a. The court similarly did not find the federal regulation of tankers to be so comprehensive as to preempt the field of tanker regulation. Rather, it read this Court's decision in *Ray* to require field preemption only of state rules governing tanker design, construction, and equipment, but not of rules pertaining to

tanker operations, personnel policies, and other staffing requirements. App. 21a-25a.

Finally, the court of appeals concluded that Coast Guard tanker regulations do not preempt Washington's BAP rules even where the Coast Guard has expressed an intent to preempt such rules. App. 29a-32a. The court recited the Court's conclusion in *Ray* that the relevant inquiry under the federal statutes providing for regulation of oil tankers is whether the Secretary has either promulgated his own regulations on the particular subject or decided that no such requirement should be imposed at all. App. 29a. But the court then proceeded to hold that, under those same statutes, "Congress did not explicitly or impliedly delegate to the Coast Guard the authority to preempt state law." App. 31a. The court again relied on Section 1018 of OPA, reasoning that in view of Congress's unwillingness to preempt state oil-spill prevention efforts on its own, it was "implausible" to conclude that Congress intended to delegate power to the Coast Guard to do so.[8]

4. The court denied petitions for rehearing filed by the United States and by Intertanko. App. 36a. Judge Graber dissented. App. 36a-54a. In her view, the court's reliance on Section 1018 of OPA was misplaced, because that section is limited to liability and compensation for oil spills, and does not apply to preventive measures. App. 51a. Judge Graber also concluded that the court had erred in holding that Congress must spe-

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[8] The Ninth Circuit did not reach two other bases raised by the United States for challenging the Washington regulations: their interference with the right of innocent passage, and their conflict with a bilateral agreement between the United States and Canada concerning traffic in the Strait of Juan de Fuca. See notes 15 and 14, *infra*. The court of appeals determined that those arguments had been raised for the first time on appeal, and the court declined to address them. App. 19a.

cifically have intended to give the Coast Guard power to preempt state regulatory schemes. App. 52a-54a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case conflicts with a holding of this Court in an area of international commerce critical to the Nation's economy. As this Court made clear in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), the Supremacy Clause requires a finding of preemption when a state rule diverges from or federal standards regarding the design, equipping, staffing, operation, or construction of tank vessels. The court below therefore erred in holding categorically that Washington's rules governing staffing and operation of tank vessels are not preempted, rather than engaging in the type of provision-by-provision analysis mandated by *Ray*. The result of the Ninth Circuit's decision is to leave in place a set of state rules that differ in numerous ways from international standards and Coast Guard regulations governing the same subject matter.

The Ninth Circuit's decision gravely impairs the Coast Guard's longstanding authority to establish uniform national rules for vessels in interstate and foreign commerce and the United States' ability to conform to the international vessel-management regime. That regime rests on the principle of reciprocity, under which the flag nation certifies the compliance of its vessels with international rules, and that certification is then accepted by other participating nations. The Ninth Circuit's decision also substantially undermines the ability of the United States to speak with one voice in international negotiations to promote tanker safety and environmental protection. Review by this Court therefore is warranted.

1. The Ninth Circuit's decision squarely conflicts with this Court's decision in *Ray* and incorrectly applies the principles of federal preemption to the Washington State regulations governing oil tankers in foreign trade.

a. More than 20 years ago, this Court held in *Ray* that the Supremacy Clause of the Constitution barred the State of Washington from imposing certain regulatory requirements and restrictions on oil tankers in Puget Sound that differed from standards imposed by federal law. *Ray* construed Titles I and II of the Ports and Waterways Safety Act of 1972 (PWSA) to establish a set of principles for federal preemption of state rules with respect to a range of international vessel-management requirements. Although the Court in *Ray* recognized the legitimate police powers of States to issue certain rules to protect coastlines from oil spills, the Court emphasized that such rules must give way when a federal or international vessel requirement has been established. 435 U.S. at 172. The Court explained that Congress acted to "make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field," *id.* at 174 (quoting H.R. Rep. No. 563, 92d Cong., 1st Sess. 15 (1971)), and vested authority in the Coast Guard to ensure "consistency of regulation and thoroughness of consideration" of the wide variety of interests to be affected, *id.* at 176. "[I]t was anticipated that there would be a single decisionmaker, rather than a different one in each State." *Id.* at 177.

Applying that analytical framework, the Court in *Ray* undertook a detailed, section-by-section analysis of each state provision at issue to determine whether a national standard existed in a federal statute or regulation addressing the same subject matter. In doing so, the Court held that federal law preempted state vessel regulations that required a tanker enrolled strictly in coastal trade to have a local pilot aboard, 435 U.S. at 158; imposed requirements on the design and con-

struction of tankers in addition to the minimum federal standards required to obtain certificates of compliance issued by the Secretary of Transportation, *id.* at 160-163; and imposed operating rules that differed from rules adopted by the Secretary concerning the passage of ships in excess of a particular tonnage, *id.* at 173-178. The Court did uphold a Washington state rule requiring a tug escort for certain tankers, but it did so only because the issue of tug escorts had not been addressed by federal regulations. The Court specifically noted that "[i]t may be that rules will be forthcoming that will pre-empt the State's present tug-escort rule, but until that occurs, the State's requirement need not give way under the Supremacy Clause." *Id.* at 172.

b. As with the state regulations found to be pre-empted in *Ray*, the State of Washington has once again sought to impose rules that differ in substantial respects from federal standards promulgated pursuant to federal statutes and international treaties.[9] Rather than engage in the type of provision-by-provision analysis required by *Ray*, however, the court of appeals held categorically that state rules pertaining to the staffing and operation of tankers are *not* preempted by Coast Guard regulations, without regard to whether the state rules conflict with the federal regulations.[10] App. 16a, 25a. That holding is flatly inconsistent with *Ray*. There the Court held that "[t]he relevant inquiry under Title I [of the PWSA] with respect to the State's power

[9] Indeed, long before *Ray*, in the 1930s Washington's attempts to impose vessel management rules that differed from national standards were struck down by this Court in *Kelly* v. *Washington ex rel. Foss Co.*, 302 U.S. 1 (1937).

[10] The only regulations held preempted by the court below concerned requirements for installation of particular equipment on tank vessels. See App. 35a.

to impose [operating rules] is * * * whether the Secretary has either promulgated his own * * * requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all." 435 U.S. at 171-172.

The result of the Ninth Circuit's decision is to leave in place a number of Washington regulations that are inconsistent with federal law and specific international standards. The following examples are drawn for illustrative purposes, and are not intended to compose an exhaustive list of the Washington regulations that create such conflicts:

– *Operating Procedures; Restricted Visibility*: The Washington BAP rules require three licensed deck officers on watch during times of restricted visibility, one of whom may be a state-licensed pilot when the vessel is in pilotage waters. Wash. Admin. Code § 317-21-200(1)(a) (1998). That requirement diverges from the Coast Guard requirement of two licensed deck officers. See 33 C.F.R. 164.13(c) (regulation implementing the STCW Convention). Because crews are staffed to meet international standards, the Washington rules also necessarily interfere with the accomplishment of another international standard: ensuring that watch officers obtain at least ten hours of rest in any 24-hour period, which must be provided in "no more than two periods, one of which shall be at least 6 hours in length." STCW Code, § A-VIII/1. To comply with both the state personnel watch requirements and the international crew-rest standards, therefore, any vessel destined for Washington waters (or in transit through those waters) must increase its crew complement or fly additional personnel to the vessel prior to entering Washington waters.

– *Drug and Alcohol Testing and Reporting*: The Washington regulations require extensive drug and alcohol testing of all crew members on tankers, including foreign flag vessels. Wash. Admin. Code § 317-21-235 (1998). Those regulations further require that the results of a positive drug test be reported to Washington within 72 hours of the confirmed test result. Those state requirements appear to apply to a drug test conducted anywhere in the world for a vessel that might arrive in Washington waters weeks or months later. Washington's requirement of random testing of all crew members on all of the vessels operated by a carrier throughout the world creates a rule different from the Coast Guard's standards, which establish post-accident and reasonable-cause testing rules for foreign flag vessels. See 46 C.F.R. 4.05-12; 46 C.F.R. Subpt. 4.06; 46 C.F.R. 16.240; 33 C.F.R. 95.035.[11] Moreover, numerous foreign governments, including the Government of Canada, have informed the Coast Guard that their laws might not allow the testing of individuals in accordance with the Washington requirements. See 59 Fed. Reg. 65,500-65,501 (1994); 57 Fed. Reg. 31,274 (1992); 56 Fed. Reg. 18,982 (1991); 53 Fed. Reg. 47,070-47,071 (1988). Indeed, even under United States law, the random testing of individuals is limited to those individuals aboard vessels who

[11] Although the international regime generally authorizes the flag nation to determine that vessels are manned appropriately, crews are qualified, and vessels are seaworthy, the STCW Convention provides guidelines for the prevention of drug and alcohol abuse by prescribing a maximum 0.08% blood alcohol level during watchkeeping as a minimum safety standard on ships and prohibiting the consumption of alcohol within four hours prior to serving as a member of a watch. See STCW Code, § B, Ch. VIII, Pt. 5.

occupy positions of safety that are specifically identified in the regulations. 46 C.F.R. 16.230; see also 56 Fed. Reg. 31,030 (1991) (noting concerns based on Fourth Amendment protections against unreasonable searches and seizures).

– *Crew Training Policies*: The Washington regulations require "training beyond the training necessary to obtain a license or merchant marine document." Wash. Admin. Code § 317-21-230 (1998). That provision exceeds the requirements of the STCW Convention, pursuant to which a certificate by a flag state will be afforded respect through reciprocity in the United States. See STCW Convention, Arts. VI, X; 46 C.F.R. Pt. 12. To meet the State's requirements, a crew would have to be flown in advance to Washington for training before serving on a voyage to Washington waters, a requirement that would often be impractical given the commercial realities of international shipping, in which vessels are frequently re-routed in mid-voyage to new destinations for the pickup or delivery of cargo. The practical effect of the Washington intrusion into international training requirements is that unless the additional state training requirements have been met, foreign and U.S. flag vessels alike may not enter Washington waters.

– *Language Proficiency Requirements*: The Washington BAP rules require that "[a]ll licensed deck officers and the vessel's designated person in charge under 33 CFR sec. 155.700 are proficient in English and speak a language understood and spoken by subordinate officers and unlicensed crew." Wash. Admin. Code § 317-21-250(1) (1998). The international requirements that the United

States has agreed to observe, by contrast, require an officer in charge of the navigation watch to be able to "perform the officer's duties * * * with a multilingual crew." See STCW Code, Tab. A-II/1, Col. 2, *English language*. The STCW standard requires licensed deck officers to be able to communicate with those who are part of the navigation watch, and only on those matters relevant to watchkeeping duties. The Washington regulations, on the other hand, require *all* licensed deck officers to speak the languages of the entire unlicensed crew, a requirement that imposes substantial additional costs and burdens on ship owners and operators.

c. There can be no doubt that the Washington regulations just discussed are preempted under the analysis mandated by this Court's decision in *Ray*. The court of appeals believed, however, that, since the enactment of OPA in 1990, the Coast Guard no longer has the authority to issue regulations that preempt state rules addressing the same subject matter. That conclusion is deeply flawed.

Contrary to the court of appeals' view, nothing in OPA affects *Ray's* holding that the Coast Guard has authority to issue regulations that preempt state rules on the same subject. It would be surprising indeed for Congress to have deprived the Coast Guard of that power to adopt uniform national standards, since, as the district court acknowledged, "shipping has traditionally been governed by federal law." App. 61a. And, in fact, the Conference Report on OPA expressly states that OPA "does *not* disturb the Supreme Court's decision in *Ray* v. *Atlantic Richfield Company*, 435 U.S. 151 (1978)." H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. 122 (1990) (emphasis added).

Significantly, moreover, OPA did not amend the provisions of the PWSA—which were relied upon by the Court in *Ray*, 435 U.S. at 161, 170, and are now codified at 33 U.S.C. 1231 and 46 U.S.C. 3703—that authorize and direct the Secretary to issue regulations governing the design, construction, alteration, repair, maintenance, operation, equipment, personnel qualification, and staffing of tanker vessels. Those statutory provisions identify a role for the States in the process of developing such standards: they require the Secretary to consult with and "consider[] the views" of "officials of State and local governments." 33 U.S.C. 1231(b)(2); 46 U.S.C. 3703(c)(2). Those provisions plainly do not contemplate that—after the Secretary has consulted with the States, considered their views, taken international standards into account, struck a balance among competing considerations, and adopted uniform federal standards—the States are then free to adopt divergent laws on the very same subjects.

In addition, Title IV of OPA makes plain that Congress intended to reinforce, not undermine, the established regime of international uniformity and reciprocity on such issues as staffing, training, and operation. Thus, Congress specifically directed the Secretary of Transportation to evaluate the "manning, training, qualification, and watchkeeping standards of a foreign country that issues documentation" to tankers, in order to determine whether they are "at least equivalent to United States law or international standards accepted by the United States"; and Congress provided that the Secretary may prohibit entry into the United States of vessels with documentation issued by countries that do not maintain and enforce such standards. OPA § 4106(a), 104 Stat. 513 (codified at 46 U.S.C. 9101(a)). That directive to the Secretary of Transportation refutes the Ninth Circuit's conclusion that Congress, in

enacting OPA, subordinated the need for international uniformity and reciprocity to the divergent policy preferences of the States. Cf. App. 16a.

In holding that the Coast Guard no longer has the power recognized in *Ray* to issue regulations having preemptive effect, the court of appeals relied almost exclusively on Section 1018 of OPA. See App. 16a. But as the court recognized elsewhere in its opinion, see App. 12a, Section 1018 addresses only the preemptive effect of "this Act"—*i.e.*, of OPA itself—not the preemptive effect of *other* federal statutes, such as the PWSA, at issue in *Ray*. The court of appeals' holding thus boils down to the notion that even though Section 1018 of OPA neither applies to other federal statutes such as the PWSA nor alters the Secretary's rulemaking authority under them, it nevertheless has a sort of penumbral effect that divests the Coast Guard of the power it previously had to issue preempting regulations under those other federal statutes. Simply to state that proposition is to refute it. Under the Constitution, Congress could divest the Coast Guard of that power under prior law only by enacting a new law that repealed that prior authority. See *INS* v. *Chadha*, 462 U.S. 919, 955 (1983). Congress did not do that in OPA.

Properly understood, then, Section 1018 expresses an intent for OPA not to displace whatever police powers States otherwise might have had prior to OPA. Thus, whether state tanker laws are preempted turns on the vast body of federal treaty, statutory, and regulatory provisions governing tanker operations, as well as the international regime on which those provisions of United States law are based.

d. The court of appeals' erroneous reliance on Section 1018 of OPA also underlies its further (and equally erroneous) holding that Coast Guard regulations that are otherwise valid require additional legislative au-

thority to have preemptive effect. See App. 29a-31a. That decision is erroneous in at least two important respects. First, 33 U.S.C. 1231 and 46 U.S.C. 3703 confer broad authority on the Coast Guard, after "considering the views" of the State and balancing competing considerations, to prescribe regulations for the design, construction, operation, equipping, personnel qualification, and staffing of tank vessels. Those provisions, which are unaffected by OPA, furnish ample authority for Coast Guard regulations that preempt conflicting state rules. Moreover, as this Court held in *Ray*, the Secretary already had authority under those provisions of the PWSA to issue regulations that preempt state regulatory efforts. Congress was not required to confer that authority all over again in OPA.

Second, and more fundamentally, Congress need not specifically confer preemptive authority on a federal agency for that agency's rules to have preemptive effect. In *City of New York* v. *FCC*, 486 U.S. 57 (1988), for example, this Court explained that "a narrow focus on Congress' intent to supersede state law is misdirected, for a pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Id.* at 64 (internal quotation marks and brackets omitted). In identifying "the correct focus" of a regulatory preemption inquiry, the Court left no doubt that "statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *Ibid.*; accord *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 154 (1982) ("A pre-emptive regulation's force does not depend on express congressional authorization to displace state law.").[12]

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[12] Although in some instances the Coast Guard has expressly stated that its regulations do *not* preempt state rules, it generally

e. Had the court of appeals conducted the proper preemption inquiry, it would have analyzed (or remanded to the district court to analyze) whether each of the state rules at issue conflicts with federal regulations or international treaty obligations, or otherwise hinders the effectuation of federal objectives in establishing uniform rules for tankers engaged in coastal and international trade. If factual questions arose about whether the state rules are inconsistent with federally-imposed standards or otherwise interfere with the federal goal of international reciprocity, the proper course would have been to develop a record on those issues.

2. Review is warranted in this case because the Ninth Circuit's decision gravely impairs the Coast Guard's longstanding authority to adopt uniform national rules affecting interstate and foreign shipping and the United States' ability to comply with its international obligations.

a. The United States has long had a strong interest in developing a uniform system of international obligations to regulate tankers. Those obligations, which are negotiated by various federal agencies and implemented through international commitments and regulations promulgated by the Coast Guard, seek to establish safety standards in such areas as tanker design, construction, equipment, staffing, and operations. The concept of reciprocity is critical to maintaining enforcement of uniform international standards. Through recognition and enforcement of standards mutually

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has been quite clear about the preemptive effect of its regulations. See, *e.g.*, 61 Fed. Reg. 1080-1081 (1996) (vessel oil spill response plan regulations); *id.* at 7917. In other cases, it has left no doubt that its regulations are intended to preclude state regulations concerning the same subject. 63 Fed. Reg. 71,770 (1998).

agreed-upon in the international community, Congress and the Coast Guard have specifically provided that the United States will accept flag-state certification of compliance with requirements concerning such matters as seafarer qualifications and training, in exchange for the recognition of certification by the United States that a vessel complies with those international standards. See page 3 and note 2, *supra*. Compare *Boos* v. *Barry*, 485 U.S. 312, 323-324 (1988) (discussing the importance of reciprocity in international relations).[13] This Court in *Ray* upheld the preemptive effect of that regime on inconsistent state rules. As the Court emphasized, Congress did not intend to permit a situation in which "a vessel * * * holding a Secre-

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[13] The one statutory exception to the principle of international uniformity and reciprocity in this setting is the requirement that certain foreign-flag tankers must be double-hulled to enter United States waters. See 46 U.S.C. 3702(a), 3703a (1994 & Supp. II 1996). The Ninth Circuit attributed great importance to Congress's deviation from the international standard in enacting that requirement in OPA, concluding that Congress's actions indicate that "strict international uniformity with respect to the regulation of tankers is not mandated by federal law and that international agreements set only minimum standards." App. 18a (internal quotation marks and brackets omitted). The court of appeals missed the significance of the fact that Congress itself enacted the double-hull requirement and that it did so by *amending* the governing federal statutory framework to mandate that departure. That specific and carefully-drawn exception reinforces the conclusion that the authority of the Coast Guard to issue uniform regulations that conform to international standards (and thereby preempt conflicting state rules) was not affected by OPA in any other respect. A fortiori, nothing in that focused amendment supports the court of appeals' holding that *States* may ignore both the international regime and the Coast Guard's regulations. That holding is fundamentally at odds with the law of preemption, and it threatens the ability of the United States to speak with one voice and to comply with its international obligations.

tary's permit, or its equivalent, [a permit from its flag nation,] to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States." 435 U.S. at 164. "The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment." *Id.* at 165. Congress no more intended to permit States to frustrate that federal purpose here, where the relevant certifications concern training and staffing policies, than it did in *Ray*.

b. The competing legal regime erected by Washington poses substantial and immediate diplomatic concerns for the United States in several critical respects. First, the existence of state regulations that conflict with international standards raises the distinct possibility that other nations that are signatories to international conventions and agreements will regard the United States as in violation of its obligations and commitments and thus take actions in response that will further undermine international uniformity. In that regard, the Department of State received a diplomatic note specifically addressing the Washington State BAP regulations from 13 nations (Belgium, Denmark, Finland, France, Germany, Greece, Italy, Japan, the Netherlands, Norway, Portugal, Spain, Sweden) and the Commission of the European Community expressing concerns that "[d]iffering regimes in different parts of the US would create uncertainty and confusion. * * * The Governments therefore urge the US to pursue a regulatory regime, on a national basis, which is consistent with agreed international standards." Note Verbale from the Royal Danish Embassy to the U.S. Department of State 1 (June 14, 1996) (File No. 60 USA.1/4). On May 7, 1997, the Government of Canada submitted a similar diplomatic protest. Letter from the

Embassy of Canada to the U.S. Department of State 1 (Note No. 0389).

Since those countries represent major maritime trading nations, significant allies of the United States, and leaders in establishing international vessel standards, their diplomatic protest is entitled to significant respect by this Court in considering this petition for a writ of certiorari. Indeed, a decision by other nations that the United States is in noncompliance with an international treaty obligation could lead to the abrogation of the agreement, a decision not to afford reciprocity to United States vessels in foreign ports, and considerable uncertainty in the legal regime governing international vessel management.[14]

Moreover, the conflicting Washington regulations undermine the credibility of the United States in negotiating international agreements that promote safe use of tankers around the world. The culmination of such negotiations has had, and will continue to have, significant desirable consequences for shipping and environmental protection in the coastal waters of the United States and its trading partners. For that kind of diplo-

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[14] A specific example of the principle of reciprocity that is undermined by the Washington BAP rules is the CVTMS Agreement, which provides that a foreign vessel transiting United States waters en route to a Canadian port need not comply with United States laws if it complies with comparable Canadian laws and regulations. Congress specifically authorized the President to enter into such an agreement. See 33 U.S.C. 1230(b)(1). The Washington BAP regulations recognize no reciprocity with Canadian rules for such transiting vessels, and such rules raise the specter that Washington will deny entry into United States waters of vessels that comply with the CVTMS Agreement. The court of appeals declined to consider that issue, see App. 19a, even though it elsewhere noted that Intertanko had raised concerns in the district court about the effect of the state BAP rules on the CVTMS Agreement, see App. 17a.

matic bargaining to result in agreements that other nations will enforce, however, the United States negotiators must be assured that they can represent the *entire* United States, and not be undermined by the actions of individual States that depart from the international regime and the United States' implementation of it. Because of the international nature of the shipping industry, the establishment of vessel standards for safety and environmental protection is generally most effective when carried out on an internationally cooperative level rather than by individual nations or political subdivisions of those nations acting on their own. See, *e.g.*, S. Treaty Doc. No. 39, *supra*, at III.[15]

c. In view of the immediate consequences caused by the Ninth Circuit's decision sustaining rules adopted by Washington that conflict with international and federal rules—and the Ninth Circuit's clear error under *Ray* in doing so—the Court should grant review now, rather than waiting for decisions of other States or courts to create further disuniformity in the international vessel-management system. Indeed, in past cases this Court has recognized the appropriateness of exercising its certiorari jurisdiction to resolve important questions affecting foreign relations before conflicting decisions in

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[15] The United States, for example, has led efforts to insure that foreign vessels transiting in innocent passage through a nation's territorial sea need only comply with international rules–as opposed to a coastal nation's unique regulations that might properly be applied if the vessel were to enter that nation's ports. By purporting to apply to all vessels in transit through its waters, see Wash. Admin. Code § 317-21-020(1) (1998), the BAP rules violate the international customary law principle protecting the right of innocent passage. See Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, Arts. 14 & 15, 15 U.S.T. 1606, 1610; UNCLOS, Arts. 21(2) & 24(1); 33 U.S.C. 1230; 33 C.F.R. Pts. 160, 164.

the courts of appeals have emerged. For example, the Court has granted certiorari to consider "[i]mportant questions concerning the effect of treaty and statute upon the privilege of aliens to acquire citizenship." *Moser* v. *United States*, 341 U.S. 41, 42 (1951). Similarly, certiorari was appropriate where a case "involve[d] important rights asserted in reliance upon federal treaty obligations." *Kolovrat* v. *Oregon*, 366 U.S. 187, 191 (1961). See also *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 407 (1964) ("We granted certiorari because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area."); *International Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 196 (1970) (certiorari granted to consider whether a federal statute preempted state law governing picketing against foreign-flag vessels in U.S. ports); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (certiorari granted to review whether the Foreign Sovereign Immunities Act provides the sole basis for obtaining jurisdiction over a foreign state in the United States).

If the Ninth Circuit decision is permitted to stand, every coastal State within the United States could feel empowered to adopt and enforce its own requirements, notwithstanding their inconsistency with the regulations of other States, the United States, and international treaties. Just in the Ninth Circuit alone, the consequences of state-by-state variations in tanker regulations could be highly problematic. The multiplicity of overlapping regulatory requirements within the United States would further frustrate the substantial national and international interests in uniform standards. The Court therefore should grant review to halt the unraveling of those uniform

standards that has been sanctioned by the Ninth Circuit in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-35010

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), PLAINTIFF-APPELLANT

AND

UNITED STATES OF AMERICA, INTERVENOR-APPELLANT

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON; CHRISTINE O. GREGOIRE, ATTORNEY GENERAL OF THE STATE OF WASHINGTON; BARBARA J. HERMAN, ADMINISTRATOR OF THE STATE OF WASHINGTON OFFICE OF MARINE SAFETY; DAVID MACEACHERN, PROSECUTOR OF WHATCOM COUNTY; K. CARL LONG, PROSECUTOR OF SKAGIT COUNTY; JAMES H. KRIDER, PROSECUTOR OF SNOHOMISH COUNTY; NORMAN MALENG, PROSECUTOR OF KING COUNTY, DEFENDANTS-APPELLEES

AND

NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL; OCEAN ADVOCATES, INTERVENORS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

[Argued and Submitted Feb. 4, 1998
Decided June 18, 1998]

JOHN C. COUGHENOUR, District Judge, Presiding.
D.C. No. CV-95-1096 JCC.

Before: BROWNING and O'SCANNLAIN, Circuit Judges, and MARQUEZ,* District Judge.

O'SCANNLAIN, Circuit Judge:

We must decide whether Washington's Best Achievable Protection Regulations, which impose requirements on oil tankers to prevent oil spills, are preempted by comparable federal legislation under the Supremacy Clause or otherwise violate the United States Constitution.

I

In the aftermath of the Exxon Valdez oil spill in 1989, the State of Washington enacted laws to protect its waters from pollution by oil tankers. *See* Wash. Rev. Code §§ 88.46.010, *et seq.*; Wash. Admin. Code §§ 317-21-010, *et seq*. These provisions require that, in order to transport oil in state waters, tanker operators must: (1) file oil-spill prevention plans with the state, and (2) comply with the state's Best Achievable Protection ("BAP") Regulations, which are promulgated by the Washington Office of Marine Safety. *See* Wash. Rev. Code § 88.46.040. The International Association of Independent Tanker Owners ("Intertanko") maintains that sixteen of these regulations are unconstitutional.

---

* The Honorable Alfredo C. Marquez, Senior Judge, United States District Court for the District of Arizona, sitting by designation.

The district court summarized the challenged regulations as follows:

> 1. Event Reporting—WAC 317-21-130. Requires operators to report all events such as collisions, allisions and near-miss incidents for the five years preceding filing of a prevention plan, and all events that occur thereafter for tankers that operate in Puget Sound.
>
> 2. Operating Procedures—Watch Practices—[WAC 317-21-200].[1] Requires tankers to employ specific watch and lookout practices while navigating and when at anchor, and requires a bridge resource management system that is the "standard practice throughout the owner's or operator's fleet," and which organizes responsibilities and coordinates communication between members of the bridge.
>
> 3. Operating Procedures—Navigation—WAC 317-21-205. Requires tankers in navigation in state waters to record positions every fifteen minutes, to write a comprehensive voyage plan before entering state waters, and to make frequent compass checks while under way.
>
> 4. Operating Procedures—Engineering—WAC 317-21-210. Requires tankers in state waters to follow specified engineering and monitoring practices.

---

[1] The district court misidentified this regulation as "WAC 317-21-130." *International Association of Independent Tanker Owners (Intertanko) v. Lowry*, 947 F. Supp. 1484, 1488 (W.D. Wa. 1996).

5. Operating Procedures—Prearrival Tests and Inspections—WAC 317-21-215. Requires tankers to undergo a number of tests and inspections of engineering, navigation and propulsion systems twelve hours or less before entering or getting underway in state waters.

6. Operating Procedures—Emergency Procedures—WAC 317-21-220. Requires tanker masters to post written crew assignments and procedures for a number of shipboard emergencies.

7. Operating Procedures—Events—WAC 317-21-225. Requires that when an event transpires in state waters, such as a collision, allision or near-miss incident, the operator is prohibited from erasing, discarding or altering the position plotting records and the comprehensive written voyage plan.

8. Personnel Policies—Training—WAC 317-21-230. Requires operators to provide a comprehensive training program for personnel that goes beyond that necessary to obtain a license or merchant marine document, and which includes instructions on a number of specific procedures.

9. Personnel Policies—Illicit Drugs and Alcohol Use—WAC 317-21- 235. Requires drug and alcohol testing and reporting.

10. Personnel Policies—Personnel Evaluation—WAC 317-21-240. Requires operators to monitor the fitness for duty of crew members, and requires operators to at least annually provide a job performance and safety evaluation for all crew

members on vessels covered by a prevention plan who serve for more than six months in a year.

11. Personnel Policies—Work Hours—WAC 317-21-245. Sets limitations on the number of hours crew members may work.

12. Personnel Policies—Language—WAC 317-21-250. Requires all licensed deck officers and the vessel master to be proficient in English and to speak a language understood by subordinate officers and unlicensed crew. Also requires all written instruction to be printed in a language understood by the licensed officers and unlicensed crew.

13. Personnel Policies—Record Keeping—WAC 317-21-255. Requires operators to maintain training records for crew members assigned to vessels covered by a prevention plan.

14. Management—WAC 317-21-260. Requires operators to implement management practices that demonstrate active monitoring of vessel operations and maintenance, personnel training, development, and fitness, and technological improvements in navigation.

15. Technology—WAC 317-21-265. Requires tankers to be equipped with global positioning system receivers, two separate radar systems, and an emergency towing system.

16. Advance Notice of Entry and Safety Reports—WAC 317-21-540. Requires at least twenty-four hours notice prior to entry of a tanker into state waters, and requires that the notice

report any conditions that pose a hazard to the vessel or the marine environment.

International Association of Independent Tanker Owners (Intertanko) v. Lowry, 947 F. Supp. 1484, 1488-89 (W.D. Wa. 1996). Failure to comply with the BAP Regulations subjects tanker owners to the following: (1) assessment of civil penalties, *see* Wash. Rev. Code § 88.46.090; (2) criminal prosecution, *see* Wash. Rev. Code § 88.46.080; and (3) denial of entry into state waters, *see* Wash. Admin. Code § 317-21-020.

Seeking both a declaration that the above-mentioned BAP Regulations are unconstitutional and a permanent injunction against their enforcement, Intertanko filed suit in federal district court.[2] Intertanko alleged that the requirements imposed by the regulations on tanker manning, training, management, safety, and on-board equipment were preempted by various federal statutes, including the Oil Pollution Act of 1990, the Port and Tanker Safety Act of 1978, the Ports and Waterways Safety Act of 1972, and the Tank Vessel Act of 1936. Intertanko also maintained that several of the BAP Regulations were preempted by Coast Guard regulations and by various international treaties. In addition to asserting that the BAP Regulations are invalid under the Supremacy Clause, Intertanko argued that the regulations violate the Commerce Clause and impermissibly infringe upon the foreign affairs power of the federal government.

The district court granted the State's motion for summary judgment and upheld every one of the

[2] Intertanko named as defendants the Governor of Washington and various other state and local officials responsible for the promulgation and enforcement of the regulations.

challenged regulations. *See Intertanko*, 947 F. Supp. at 1500-01. Intertanko filed a timely appeal. Three environmental organizations—the Washington Environmental Council, the Natural Resources Defense Council, and Ocean Advocates—have intervened on behalf of the state defendants, while the United States has intervened on behalf of Intertanko.

II

Intertanko's primary contention on appeal is that the BAP Regulations are preempted by federal law. Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Consideration of preemption issues "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L.Ed. 1447 (1947). Accordingly, "'[t]he purpose of Congress is the ultimate touchstone'" of preemption analysis. *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S. Ct. 1185, 55 L.Ed.2d 443 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 11 L.Ed.2d 179 (1963)).

The state defendants maintain that Congress expressly indicated its intent not to preempt state law in the field of oil-spill prevention when it passed § 1018 of the Oil Pollution Act of 1990 ("OPA 90"). *See* Pub. L. No. 101-380, 104 Stat. 484 (codified at 33 U.S.C. § 2701, *et seq.*). That provision states, in pertinent part:

(a) Preservation of State authorities . . . *Nothing in this Act*[3] or the Act of March 3, 1851 shall—

> (1) *affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to*—
>
> > (A) *the discharge of oil or other pollution by oil within such State* . . . .

. . . .

(c) *Additional requirements* and liabilities; penalties *Nothing in this Act*, the Act of March 3, 1851 (46 U.S.C. 183 *et seq.*) or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), *shall in any way affect, or be construed to affect, the authority of* the United States or *any State* or political subdivision thereof—

> (1) *to impose* additional liability or *additional requirements*; or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;

relating to the discharge, or substantial threat of a discharge, of oil.

33 U.S.C. § 2718(a) (emphasis added).

---

[3] When OPA 90 was codified, all references to "Act" became "chapter."

The state defendants maintain that, by providing that nothing in OPA 90 preempts states from imposing "additional liability or requirements with respect to the discharge of oil or other pollution by oil," 33 U.S.C. § 2718(a); *see also* 33 U.S.C. § 2718(c), § 1018 grants states broad authority to enact oil-spill prevention regulations. In response, Intertanko argues that the savings clause of § 1018, which is located in Title I of OPA 90, applies only to that Title. Therefore, Intertanko asserts, § 1018 is limited in its application to state laws concerning liability and penalties, the subjects covered by Title I. Intertanko claims that the savings clause does *not* apply to the other eight Titles of OPA 90, including Title IV, which concerns oil-spill prevention.[4] Therefore, Intertanko contends, the savings clause contained in Title I does not preclude the oil-spill prevention provisions included in Title IV from preempting the oil-spill prevention provisions included in the BAP Regulations. In support of this argument, Intertanko notes that § 1018's savings clause is located not in a preamble to OPA 90, but instead near the end of Title I. Intertanko further observes that the language of § 1018 is consistent with the subject matter of Title I, which concerns oil-spill liability and penalties,

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[4] OPA 90 contains nine Titles. These include: Title I, Oil Pollution Liability and Compensation; Title II, Conforming Amendments; Title III, International Oil Pollution Prevention and Removal; Title IV, Prevention and Removal; Title V, Prince William Sound Provisions; Title VI, Miscellaneous Provisions; Title VII, Oil Pollution Research and Development Program; Title VIII, Trans-Alaska Pipeline System; and Title IX, Oil Spill Fund Transfers. *See* 33 U.S.C. § 2701, *et seq.*

but inconsistent with the subject matter of Title IV, which concerns oil-spill prevention.[5]

Intertanko's argument that § 1018's savings clause applies only to Title I is at odds with that clause's plain language. Section 1018(a) provides that "[n]othing *in this Act*" preempts states from "imposing any . . . requirements with respect to the discharge of oil or other pollution by oil." 33 U.S.C. 2718(a) (emphasis added). By its plain language, § 1018 applies not only to Title I but to the other eight Titles of OPA 90 as well. Accordingly, because the oil-spill prevention requirements set forth in the BAP Regulations clearly "respect"[6] the discharge of oil, they are not preempted by anything in OPA 90.

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[5] Intertanko also points out that Title I of OPA 90 is labeled "Liability and Compensation." However, § 6001(c) of OPA 90 states that "[a]n inference of legislative construction shall not be drawn by reason of the caption or catch line of a provision enacted by this Act." 33 U.S.C. § 2751(c).

[6] Like the phrase "relating to" employed in § 1018(c), the phrase "with respect to" used in § 1018(a) is "clearly expansive." *De Buono v. NYSA-ILA Medical & Clinical Servs. Fund*, — U.S. ——, ——, 117 S. Ct. 1747, 1751, 138 L.Ed.2d 21 (1997) (discussing "relate to" language of Employee Retirement Income Security Act of 1974). However, we decline to read § 1018's language "according to its terms . . . since, as many a curbstone philosopher has observed, everything is related to everything else." *California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A.*, 519 U.S. 316, 117 S. Ct. 832, 843, 136 L.Ed.2d 791 (Scalia, J., concurring). Rather, in determining whether state oil-spill prevention laws "respect" or "relate to" the "discharge of oil," we must look to the "objectives" of OPA 90. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins.*, 514 U.S. 645, 655-56, 115 S. Ct. 1671, 131 L.Ed.2d 695 (1995) (in determining scope of clause preempting "all state laws insofar as they . . . *relate to* any employee benefit plan," courts must "look to the *objectives* of the ERISA statute as a guide to the scope of the state law that Congress understood would survive") (emphasis added). Because one of the explicit "objectives" of OPA 90 is oil-spill prevention, *see* OPA 90 §§ 2701-2718 (Title IV—Oil Spill Prevention), § 1018 prevents anything in OPA 90 from preempting state laws in this field.

III

OPA 90 is not the only federal statute that regulates tanker vessels, however. Other such statutes include the Port and Tanker Safety Act of 1978 ("PTSA"), *see* Pub. L. No. 95-474, 92 Stat. 471, the Ports and Waterways Safety Act of 1972 ("PWSA"), *see* Pub. L. No. 92-340, 86 Stat. 424, and the Tank Vessel Act of 1936, *see* Pub. L. No. 74-765, 49 Stat. 1889. The United States contends that even if OPA 90 does not preempt the challenged BAP Regulations because of the savings clause in § 1018, these other federal statutes do.

In response, the state defendants maintain that, by its plain language, the savings clause of § 1018 applies not only to OPA 90 but to the other federal tanker regulation statutes as well. The plain language of § 1018 cannot bear this interpretation. Section 1018 says that nothing "in *this Act*"[7] preempts state authority to impose additional requirements. *See* 33 U.S.C. § 2718(a), (c). Thus, § 1018 does not explicitly address whether state oil-spill prevention rules may be preempted by federal "Acts" *other than* OPA 90.

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[7] Section 1018 refers to "the Act of March 3, 1851" as well as "this Act." The 1851 Act is a limitation of liability statute that permits a party to enjoin all pending suits and to compel them to be filed in a special limitation proceeding. It is undisputed that the 1851 Act is not relevant to this appeal.

The state defendants also contend that, because OPA 90 amends the PWSA, the PTSA, and the Tank Vessel Act, the savings clause of § 1018 need not expressly refer to those Acts to prevent them from preempting state law. However, the state defendants do not, and could not, offer any authority for the proposition that a savings clause in an Act that amends another Act *necessarily* applies to the amended Act, even when the savings clause expressly refers to "*this* Act." Although OPA 90 amended prior federal statutes, § 1018 by its plain language has no automatic impact on preemption caused by those statutes.

IV

Because § 1018 of OPA 90 does not by its plain language affect preemption by federal Acts other than OPA 90, we must determine whether such Acts otherwise impliedly or expressly preempt the BAP Regulations. The Supreme Court has recognized three types of preemption: conflict preemption, field preemption, and express preemption.[8] *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L.Ed.2d 407 (1992). Conflict preemption occurs "when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California v. ARC America Corp.*, 490 U.S. 93, 100-01, 109 S. Ct. 1661, 104 L.Ed.2d 86 (1989) (citations omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85

[8] As the Supreme Court observed in *English v. General Electric Co.*, 496 U.S. 72, 110 S. Ct. 2270, 110 L.Ed.2d 65 (1990), these categories are not "rigidly distinct." *Id.* at 79 n.5, 110 S. Ct. 2270.

L.Ed. 581 (1941)). Field preemption exists when federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it." *Fidelity Fed. Sav. & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L.Ed.2d 664 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146 (1947)). Finally, express preemption exists when Congress explicitly states its intent to displace state law in the statute's language. *See Cipollone*, 505 U.S. at 516, 112 S. Ct. 2608. The issues of conflict, field, and express preemption were all raised by Intertanko in district court and are raised again on appeal.

A

We first examine whether the BAP Regulations are subject to conflict preemption. Conflict preemption exists "when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California v. ARC America Corp.*, 490 U.S. at 100-01, 109 S. Ct. 1661 (quoting *Hines*, 312 U.S. at 67, 61 S. Ct. 399). Intertanko does not argue that compliance with both federal law and the BAP Regulations is impossible; rather, Intertanko contends that the BAP Regulations interfere with "the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67, 61 S. Ct. 399.

1

Congress's first effort in the field of tanker regulation was the Tank Vessel Act, passed in 1936. *See* Pub. L. No. 74-765, 49 Stat. 1889. The Tank Vessel Act "sought to effect a 'reasonable and uniform set of rules and regulations concerning ship construction . . .,'"

Ray v. Atlantic Richfield Co., 435 U.S. 151, 166, 98 S. Ct. 988, 55 L.Ed.2d 179 (1978) (quoting H.R. Rep. No. 74-2962, at 2 (1936)).

In 1972, the Tank Vessel Act was significantly expanded by the Ports and Waterways Safety Act ("PWSA"), *see* Pub. L. No. 92-340, 86 Stat. 424, which "subjects to federal rule the design and operating characteristics of oil tankers." *Ray*, 435 U.S. at 154, 98 S.Ct. 988. The PWSA contains two Titles. Title I is concerned with controlling tanker traffic. *See id.* at 161, 98 S. Ct. 988. Title I authorizes the Coast Guard to "specify[] the times for vessel movement, [to] establish[] size and speed limitations and vessel operating conditions, and [to] restrict[] vessel operation to those vessels having the particular operating characteristics which [it] considers necessary for safe operation under the circumstances." *Id.* at 169-70, 98 S.Ct. 988. Whereas Title I of the PWSA focuses on tanker traffic, Title II of the Act is concerned with tanker design, construction, and operation. As the Supreme Court explained in *Ray*, whereas Title II can be "compare[d] to 'providing safer surface highways and traffic controls for automobiles,' . . . Title II [may be] likened to 'providing safer automobiles to transit those highways.'" *Id.* at 161 n.9, 98 S. Ct. 988 (quoting S. Rep. No. 92-724, at 9-10 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2766, 2769).

In 1978, the PWSA and Tank Vessel Act were supplemented by the Port and Tanker Safety Act ("PTSA"). *See* Pub. L. No. 95-474, 92 Stat. 1471. The PTSA requires the Secretary of Transportation to establish regulations addressing vessel management, drug and alcohol testing, seafarer training and qualifications, casualty reporting, seafarer discipline, manning,

work hours, pilotage, and language requirements. *See* 46 U.S.C. §§ 9101, 9102.

The federal tanker regulation scheme was again substantially altered when Congress passed OPA 90. *See* Pub. L. No. 101-380, 104 Stat. 484. Enacted following the Exxon Valdez oil spill, OPA 90 addresses oil-pollution prevention, removal, liability, and compensation. *See* 33 U.S.C. § 2701, *et. seq.* OPA 90 imposed a number of new federal oil-spill prevention requirements, including: random drug and alcohol testing, *see* 46 U.S.C. § 7702; a provision mandating that working hours on a tanker be no more than 15 hours in any 24-hour period, or more than 36 hours in any 72-hour period, *see* 46 U.S.C. § 8104(n); and a requirement that tankers be equipped with double hulls, *see* 46 U.S.C. § 3703a.

Intertanko maintains that the BAP Regulations frustrate the purposes and objectives of Congress in adopting this legislative scheme. We disagree. In determining "the full purposes and objectives of Congress," *Hines*, 312 U.S. at 67, 61 S. Ct. 399, we must look not to the purposes and objectives of any single Act, but instead to Congress's overarching purposes and objectives in the relevant legislative field. *See California v. ARC America Corp.*, 490 U.S. at 102, 109 S.Ct. 1661 ("Appellees' only contention is that state laws permitting indirect purchaser recoveries pose an obstacle to the accomplishment of the purposes and objectives of Congress. State laws to this effect are consistent with the broad purposes of the *federal antitrust laws*. . . ."") (citing cases involving both Sherman Act and Clayton Act) (emphasis added). In the field of tanker regulation, the overarching purposes

of Congress are best revealed by OPA 90. As the most recent federal statute in the field, OPA 90 reflects "the *full* purposes and objectives of Congress," *Hines*, 312 U.S. at 67, 61 S. Ct. 399 (emphasis added), better than the PWSA, the PTSA, or the Tank Vessel Act, all of which OPA 90 was designed to complement.

As explained above, § 1018 of OPA 90 does not *expressly* apply to other federal "Acts." However, the enactment of a new federal statute in a particular legislative field may influence whether state laws in that field "frustrate the *full* purposes and objective of Congress." *Hines*, 312 U.S. at 67, 61 S. Ct. 399 (emphasis added). This is true even if the new statute contains a non-preemption clause which does not address other statutes in the field, *cf. Freightliner Corp. v. Myrick*, 514 U.S. 280, 288, 115 S. Ct. 1483, 131 L.Ed.2d 385 (1995) (existence of statutory provision containing "express definition of the pre-emptive reach of a statute . . . does not mean that the express clause entirely forecloses any possibility of implied pre-emption"), or does not contain a non-preemption clause at all, *see California v. ARC America Corp.*, 490 U.S. at 102, 109 S.Ct. 1661. Section 1018 of OPA 90 sheds considerable light upon the purposes and objectives of Congress in effectuating a federal scheme of tanker regulation. That provision demonstrates Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability, and compensation. Accordingly, we decline Intertanko's invitation to strike down the challenged BAP Regulations in their entirety on the ground that they frustrate Congress's purposes and objectives in enacting OPA 90, the PWSA, the PTSA, and the Tanker Safety Act.

2

Intertanko next contends that the BAP Regulations frustrate the purposes and objectives of Congress because they conflict with various international treaties. These treaties include: the International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47; the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 17 I.L.M. 546; the Multilateral International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459; the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region, Dec. 19, 1979, 32 U.S.T. 377; and the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261.[9]

As the Supreme Court observed in *Hines*, in determining whether a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . it is of importance that [the state] legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority." *Hines*, 312 U.S. at 67-68, 61 S. Ct. 399. States have no power to override international agreements entered into by the federal government. *See Zschernig v. Miller*, 389 U.S. 429, 441, 88 S. Ct. 664, 19 L.Ed.2d 683 (1968).

Intertanko's argument that the BAP Regulations are preempted by these international treaties is under-

[9] Despite being a signatory, the United States has not ratified the United Nations Convention on the Law of the Sea.

mined by our decision in *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984). In *Chevron*, we held that an Alaska statute that prohibited tankers from discharging ballast into the territorial waters of Alaska was not preempted by either federal statute or international agreement. *See Chevron*, 726 F.2d at 485. We stated:

> [T]he PWSA/PTSA does not mandate strict international uniformity. Although the legislative history of the PWSA/PTSA refers to congressional intent to abide by international agreements regarding the regulation of tankers, the statute nonetheless gives the Coast Guard specific authority to establish stricter requirements than those set by international agreements. *This indicates Congress' view that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction.*

Id. at 493-94 (citations omitted) (emphasis added).

Passage of OPA 90 by Congress only reinforces this court's conclusions in *Chevron* that "strict international uniformity" with respect to the regulation of tankers is not "mandate[d]" by federal law and that "international agreements set only minimum standards." *Id.* at 493. To reach any other conclusion, we would have to read § 1018 to provide that the Act permits state tanker regulation only when the field in question is not subject to international regulation. However, § 1018 plainly states that nothing in the Act shall be interpreted to prohibit states from imposing "*any* additional liability or requirements," 33 U.S.C. § 2718(a) (emphasis added),

not merely "additional liability or requirements where such requirements would not conflict with an international treaty."

3

The United States raises for the first time on appeal two arguments concerning specific conflicts between the BAP Regulations and international treaties. These arguments are: (1) that the BAP Regulations interfere with the international right of "innocent passage," *see* United Nations Convention on the Law of the Sea, Dec. 10, 1982, § 3, arts. 17-25, 21 I.L.M. 1261, 1273- 75; and (2) that the BAP Regulations conflict with a bilateral agreement between the United States and Canada concerning traffic in the Strait of Juan de Fuca at the entrance to Puget Sound, *see* The Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region, Dec. 19, 1979, 32 U.S.T. 377. Generally, we will not consider arguments that are raised for the first time on appeal. *See Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir. 1990); *Abex Corp. v. Ski's Enters., Inc.*, 748 F.2d 513, 516 (9th Cir. 1984). The court has discretion to address such arguments only: (1) "in the 'exceptional' case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process," *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985) (quoting *United States v. Greger*, 716 F.2d 1275, 1277 (9th Cir. 1983)); (2) "when a new issue arises while appeal is pending because of a change in the law," *id.*; or (3) "when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed," *id.*

In support of its claim that we may exercise our discretion to address its new arguments, the United States cites our decision in *Kimes v. Stone*, 84 F.3d 1121 (9th Cir. 1996), in which we considered a Supremacy Clause argument raised for the first time on appeal. *See id.* at 1126. In *Kimes*, however, we noted that the issue was "purely a question of law" and that "consideration of the issue would not prejudice [the opposing party's] ability to present relevant facts that could affect our decision." *Id.* By contrast, the state defendants have not had the opportunity to develop the record concerning whether the BAP Regulations practically impair the right of innocent passage or are enforced in a manner that is inconsistent with the bilateral agreement with Canada covering traffic in the Strait of Juan de Fuca. Accordingly, we do not consider the United States's new treaty-based arguments on appeal.[10]

B

Intertanko next argues that federal regulation of oil tankers by OPA 90, the PWSA, the PTSA, and the Tank Vessel Act is so comprehensive as to preempt impliedly the field of tanker regulation. Field preemption exists when federal law so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Fidelity Fed. Sav. & Loan Assn.*, 458 U.S. at 153, 102 S. Ct. 3014 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230, 67 S. Ct. 1146). The leading case on the subject of field preemption of state statutes that

[10] The United States does not assert that we have discretion to entertain its new arguments on miscarriage-of-justice grounds or because of a post-appeal change in the law.

regulate tankers is *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978). In *Ray*, the Supreme Court examined the preemptive effect of the PWSA on the Washington Tanker Law, 1975 Wash. Laws ch. 125, a statute that required various design-safety features for tankers operating in Puget Sound. The Court found that certain safety features imposed by the Washington Tanker Law were preempted, but that others were not. *See Ray*, 435 U.S. at 160, 168, 173, 178, 180, 98 S. Ct. 988.

1

One of the provisions of the Washington Tanker Law addressed in *Ray* required oil tankers weighing between 40,000 and 125,000 deadweight tons to possess certain safety features, including a minimum amount of horsepower, twin screws, two radars, and double hulls. *See id.* at 160, 98 S. Ct. 988. After a thorough examination of the regulatory scheme established by Title II of the PWSA, the Court found that these state requirements were impliedly preempted. *See id.* at 168, 98 S. Ct. 988. However, this finding of implied preemption was limited to the field of tanker "design and construction." *Id.* at 163- 64, 98 S. Ct. 988. The Court stated:

> This statutory pattern shows that Congress, insofar as *design characteristics* are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States. This indicates to us that Congress intended uniform national standards for *design and construction* of tankers that would foreclose the imposition of different or more stringent state require-

> ments. In particular, as we see it, Congress did not anticipate that a vessel found to be in compliance with the Secretary's *design and construction* regulations and holding a Secretary's permit, or its equivalent, to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States on the ground that its *design characteristics* constitute an undue hazard.

Id. (emphasis added); *see also id.* at 165, 98 S. Ct. 988 ("Enforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the *design* of oil tankers.") (emphasis added); *id.* at 166, 98 S. Ct. 988 ("That the Nation was to speak with one voice *with respect to tanker-design standards* is supported by the legislative history of Title II . . . .") (emphasis added); *id.* at 166 n.15, 98 S.Ct. 988 ("The Court has previously observed that ship *design and construction* are matters for national attention.") (emphasis added); *id.* at 168 n.19, 98 S. Ct. 988 ("Here it is sufficiently clear that Congress directed the promulgation of standards on the national level, as well as national enforcement, with vessels having *design characteristics* satisfying federal law being privileged to carry tank-vessel cargoes in United States waters.") (emphasis added).

The *Ray* Court next proceeded to examine a provision of the Washington Tanker Law mandating tug escorts for any vessel that did not have the safety features required by the Tanker Law's other provisions. *See id.* at 171, 98 S. Ct. 988. The Court began its analysis of the tug-escort requirement by observing

that a tanker's certification "under federal law as a vessel safe insofar as its design and construction characteristics are concerned does not mean that it is free to ignore otherwise valid state or federal rules or regulations that do not constitute design or construction specifications." *Id.* at 168-69, 98 S. Ct. 988. The Court noted that the Washington Tanker Law's tug escort provision was "not a design requirement," but instead was "more akin to an operating rule arising from the peculiarities of local waters that call for special precautionary measures." *Id.* at 171, 98 S. Ct. 988. The Court further observed that "[t]he relevant inquiry . . . with respect to the State's power to impose a tug-escort rule is . . . whether the [Coast Guard] has either promulgated [its] own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all." *Id.* at 171-72, 98 S. Ct. 988. The Court concluded that because the Secretary had not imposed such a requirement, "the State's requirement need not give way under the Supremacy Clause." *Id.* at 172, 98 S. Ct. 988. These excerpts from *Ray* teach that "operating rule[s]," *id.* at 171, 98 S. Ct. 988, unlike design and construction requirements, are not automatically subject to field preemption by the PWSA. Attempting to distinguish *Ray*, Intertanko argues that *Ray*'s analysis of "operating rule[s], *id.*, applies only to those requirements that "aris[e] from the peculiarities of local waters." *Id.* This argument fails to recognize, however, that the operating requirements imposed by the BAP Regulations are designed for the same "local waters," namely Puget Sound, as was the Washington Tanker Law contested in *Ray*.

Intertanko also maintains that *Ray* used the phrase "design and construction" as a "shorthand" for all Title II PWSA matters, which include tanker operations as well as design and construction. Intertanko's interpretation of *Ray*, however, is plainly inconsistent with our own interpretation of the same case in *Chevron*. In *Chevron*, we stated:

> The [*Ray*] Court's finding of preemption is *specifically limited to the regulation of vessel "design characteristics"* and thus does not control the outcome of the present case involving ocean pollutant discharges. As a matter of fact, *the court specifically explained that tankers must meet "otherwise valid state or federal rules or regulations that do not constitute design or construction specifications."*

Chevron, 726 F.2d at 487 (citations omitted) (quoting *Ray*, 435 U.S. at 168-69, 98 S. Ct. 988) (emphasis added). We concluded in *Chevron* that "deballasting" does not qualify as "design or construction" and that, consequently, deballasting regulations were not automatically preempted under *Ray*. *Id.* Because the discharge of ballast involves an "operation" directly related to the sailing of a tanker,[11] *Chevron* undermines Intertanko's argument that the *Ray* Court used "design

[11] As we observed in *Chevron*:

> Unloaded oil tankers must take on seawater for ballast to ensure proper submergence and vessel stability. Upon arrival in port, the tankers must then discharge this ballast—i.e., "deballast"—before loading their cargo tanks with oil.

Chevron, 726 F.2d at 485.

and construction" as "shorthand" for "design, construction, and operations."

Virtually all of the challenged BAP Regulations impose operational requirements rather than design and construction requirements. These operational requirements include: accident reporting, *see* Wash. Admin. Code § 317-21-130; watch practices, *see* Wash. Admin. Code § 317-21-200; navigation procedures, *see* Wash. Admin. Code § 317-21-205; engineering procedures, *see* Wash. Admin. Code § 317-21-210; prearrival tests and inspections, *see* Wash. Admin. Code § 317-21-215; emergency procedures, *see* Wash. Admin. Code § 317-21-220; rules against altering or destroying records, *see* Wash. Admin. Code § 317-21-225; training programs, *see* Wash. Admin. Code § 317-21-230; illicit drugs and alcohol use, *see* Wash. Admin. Code § 317-21-235; personnel evaluation, *see* Wash. Admin. Code § 317-21-240; work hours, *see* Wash. Admin. Code § 317-21-245; language requirements, *see* Wash. Admin. Code § 317-21-250; training records for crew members, *see* Wash. Admin. Code § 317-21-255; management, *see* Wash. Admin. Code § 317-21-260; and advance notice of entry and safety reports, *see* Wash. Admin. Code § 317-21-540. Because these regulations do not qualify as "design and construction" requirements, they are not automatically subject to field preemption under *Ray*.

2

We reach a different conclusion with respect to Wash. Admin. Code § 317-21-265, however.[12] The first

[12] Wash. Admin. Code § 317-21-265 provides, in full:

(1) Navigation Equipment. An oil spill prevention plan for a tank vessel must describe navigation equipment used on a vessel covered by the plan which includes:

(a) Global positioning system (GPS) receivers; and

(b) Two separate radar systems, one of which is equipped with an automated radar planning aid (ARPA).

(2) Emergency towing system. Tankers must be equipped with an emergency towing system on both the bow and stern within two years from the effective date of this chapter. The emergency towing system comprises:

(a) Designated strong points able to withstand the load to which they may be subjected during a towing operation in maximum sustained winds of forty knots and sea or swell heights of five and a half meters (18 feet);

(b) Appropriate chafing chains, towing pennant, tow line and connections of a size and strength to tow the tanker fully laden in maximum sustained winds of forty knots and sea or swell heights of five and a half meters (18 feet); and

(c) Appropriately sized and colored marker buoys attached to the towing pennants.

(3) The emergency towing system must be deployable:

(a) In 15 minutes or less by at most two crew members;

(b) From the bridge or other safe location when the release points are inaccessible; and

(c) Without use of the vessel's electrical power.

subsection of that provision, entitled "Navigation Equipment," requires tankers to possess global positioning system ("GPS") receivers, as well as two separate radar systems. *See* Wash. Admin. Code § 317-21-265(1). The navigational equipment requirements imposed therein are virtually indistinguishable from the radar and navigation devices that the *Ray* Court found to be regulated preemptively by the PWSA. The Washington Tanker Law challenged in *Ray* required "[t]wo radars in working order and operating, one of which must be collision avoidance radar." *Ray*, 435 U.S. at 160, 98 S. Ct. 988. The *Ray* Court, after reviewing the requirements of the Washington Tanker Law, including the radar and navigational equipment requirements, stated that "the *foregoing design requirements*, standing alone, are invalid in light of the PWSA and its regulatory implementation." *Id.* at 160-61, 98 S.Ct. 988 (emphasis added). Because the GPS and radar requirements are virtually identical to the navigational equipment required by the Washington Tanker Law, *Ray* dictates that Wash. Admin. Code § 317-21-265(1) must also be classified as a "design requirement[]." *Id.* at 160-61, 98 S. Ct. 988. Applying *Ray*, we hold that Wash. Admin. Code § 317-21-265(1) is preempted by the PWSA.

In support of its conclusion that the navigational equipment rules imposed by Wash. Admin. Code § 317-21-265(1) are not "design requirements" subject to preemption under *Ray*, the district court stated that "[t]he requirements for global positioning system receivers and two separate radar systems under WAC 317-21-265 should be considered equipment necessary for vessel operating procedures under 33 U.S.C. § 1223," and therefore "are not subject to implied pre-

emption." *Intertanko*, 947 F. Supp. at 1495 n.9. Regardless of whether radar and other navigational systems "should" be considered "equipment necessary for vessel operating procedures," the Supreme Court considered them "design requirements." *Ray*, 435 U.S. at 160-61, 98 S. Ct. 988. We are bound by the *Ray* Court's classification of these devices as "design requirements," and by its conclusion that, as such, they are impliedly preempted by the PWSA. *See id.*

The second requirement imposed by Wash. Admin. Code § 317-21-265 is that all ships be equipped with an emergency towing package. *See* Wash. Admin. Code § 317-21-265(2). The state defendants contend that the towing package provision is "not a design or construction requirement," but rather a "requirement to have certain equipment installed on a tanker," and that, consequently, this provision is not preempted under *Ray*. However, the state defendants' argument fails to recognize that "design requirements" and "equipment requirements" are not mutually exclusive. *See Chevron*, 726 F.2d at 500 ("Alaska has left all *designing of vessels and equipment* to the Coast Guard and has only prohibited the discharge of polluted ballast.") (emphasis added). Section 317-21-265(2) provides that towing equipment must meet several specific design standards. These standards include "[d]esignated strong points," Wash. Admin. Code § 317-21-265(2)(a), and "[a]ppropriate chafing chains, towing pennant, tow line and connections," Wash. Admin. Code § 317-21-265(2)(b), all of which must be capable of withstanding "sustained winds of forty knots and sea or swell of five and a half meters," Wash. Admin. Code § 317-21-265(2)(a), (b). Because such design requirements are preempted by the PWSA, *see Ray*, 435 U.S. at 160-61,

98 S. Ct. 988, we hold that the emergency towing package requirement, like the GPS and radar requirements, is invalid under the Supremacy Clause.

C

We finally address whether any of the BAP Regulations are *expressly* preempted by federal law. In *Ray*, the Supreme Court held that, because the challenged tug-escort rule was not a design or construction requirement, "[t]he relevant inquiry . . . with respect to the State's power to impose [the] tug-escort rule is . . . whether the Secretary has either promulgated his own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all." *Ray*, 435 U.S. at 171-72, 98 S. Ct. 988. *Ray* thus teaches that once a court has determined that state tanker regulations are not subject to implied preemption as "design and construction" requirements, the court still must examine whether the state regulations are expressly preempted. Accordingly, having determined that all of the BAP Regulations except Wash. Admin. Code § 317-21-265 are not subject to implied preemption as design and construction requirements, we must now inquire whether those regulations are subject to express preemption.

Intertanko contends that some of the BAP Regulations are expressly preempted not by any federal statute but by a variety of federal regulations issued by the Coast Guard. A federal agency, acting through its rulemaking processes, can effect preemption of state law. *See Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 153-54, 102 S.Ct. 3014. Indeed, "[f]ederal regulations have no less pre-emptive effect than federal statutes."

Id. at 153, 102 S. Ct. 3014. According to Intertanko, certain of the BAP Regulations are expressly preempted by Coast Guard statements accompanying the issuance of federal regulations concerning watch practices, *see* 58 Fed. Reg. 27,268, 27,632 (1993); steering gear for vessels underway, *see* 60 Fed. Reg. 24,767, 24,771 (1995); and drug and alcohol testing, *see* 58 Fed. Reg. 68,274, 68,277 (1993).[13]

Preemption by regulations enacted by a federal agency does not occur if that agency is acting beyond the scope of its delegated powers. As the Supreme Court explained in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 106 S. Ct. 1890, 90 L.Ed.2d 369 (1986):

> [A] federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority. . . . [A]n agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.
>
> . . . .
>
> An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would

[13] Intertanko also contends that Wash. Admin. Code § 317-21-265 (navigation equipment and emergency towing system) is preempted by a Coast Guard regulation concerning on-board towing equipment. *See* 58 Fed. Reg. 67,988, 67,993 (1993). Because we hold that Wash. Admin. Code § 317-21-265 is invalid under *Ray*, we need not address this argument.

> be to grant to the agency power to override Congress. This we are both unwilling and unable to do.

Id. at 374-75, 106 S. Ct. 1890; *see also United States v. Shimer*, 367 U.S. 374, 381-82, 81 S. Ct. 1554, 6 L.Ed.2d 908 (1961) (administrative agency cannot preempt state law if "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned").

Louisiana Public Service Commission teaches that the relevant inquiry in determining whether a federal regulation preempts state law is whether the agency "is acting within the scope of its congressionally delegated authority." *Id.* at 374, 81 S. Ct. 1554. When it passed OPA 90, Congress required the Coast Guard to implement a wide range of oil-spill prevention rules. *See* 33 U.S.C. §§ 2701-2718. However, Congress did not explicitly or impliedly delegate to the Coast Guard the authority to preempt state law. Indeed, § 1018 of OPA 90 establishes that nothing in OPA 90 may be construed as impairing the ability of the states to impose their own oil-spill prevention requirements.[14] *See* 33 U.S.C. § 2718. In view of Congress's unwillingness to preempt state oil-spill prevention efforts on its own, we find implausible the argument that it intended to delegate

[14] Although § 1018 expressly applies only to OPA 90, it shapes the "full purposes and objectives" of Congress, *Hines*, 312 U.S. at 67, 61 S. Ct. 399, with respect to the entire legislative field of oil-spill prevention. *See* Part IV.A.1, *infra*. Accordingly, we hold that the Coast Guard impermissibly acts beyond its "congressionally delegated authority," *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374, 106 S. Ct. 1890, not only when it purports to preempt state oil-spill prevention laws under the authority of OPA 90, but also when it purports to do so under the authority of other federal statutes.

power to the Coast Guard to do so. Therefore, we reject Intertanko's position that the Coast Guard was "acting within the scope of its congressionally delegated authority," *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374, 106 S.Ct. 1890, in enacting regulations that purport to preempt state law.

V

Intertanko next contends that the BAP Regulations violate the Commerce Clause. The Commerce Clause provides that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several states. . . ." U.S. Const., art. I, § 8. Although this clause by its express terms serves only as an affirmative grant to the federal government of the power to regulate interstate commerce, it has also been interpreted by the Supreme Court to impose limits on the ability of the states to do so. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 117 S. Ct. 1590, 1596, 137 L.Ed.2d 852 (1997).

The Supreme Court has distinguished between two types of impermissible state regulations that incidentally burden interstate commerce. A facially nondiscriminatory regulation supported by a legitimate state interest which incidentally burdens interstate commerce is constitutional unless the burden on interstate trade is clearly excessive in relation to the local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L.Ed.2d 174 (1970). However, when a regulation "clearly" discriminates against interstate commerce, it violates the Commerce Clause unless the discrimination is demonstrably justified by a valid factor unrelated to state protectionism. *See Wyoming v. Oklahoma*, 502 U.S. 437, 454, 112 S. Ct. 789, 117 L.Ed.2d 1 (1992). In *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008 (9th Cir. 1994), this court summarized the proper analysis as follows:

> If the regulations discriminate in favor of in-state interests, the state has the burden of establishing that a legitimate state interest unrelated to economic protectionism is served by the regulations that could not be served as well by less discriminatory alternatives. In contrast, if the regulations apply evenhandedly to in-state and out-of-state interests, the party challenging the regulations must establish that the incidental burdens on interstate and foreign commerce are clearly excessive in relation to the putative local benefits.

Id. at 1012 (citations omitted).

Intertanko asserts that the cost for a tanker operator to develop an oil-spill prevention plan that meets the standards established by the BAP Regulations is approximately $12,000. However, Intertanko fails to point to any evidence in the record to establish that this "incidental burden[] on interstate and foreign commerce [is] clearly excessive in relation to the putative local benefits." *Id.* Nor does Intertanko even argue that the BAP Regulations "discriminate in favor of in-state interests." *Id.* Therefore, Intertanko's contention that the BAP Regulations violate the Commerce Clause is without merit.

VI

Finally, Intertanko maintains that the BAP Regulations impermissibly intrude upon the foreign affairs power of the federal government. The Constitution entrusts the administration of foreign affairs to the President and to Congress. *See Zschernig v. Miller*, 389 U.S. 429, 432, 88 S. Ct. 664, 19 L.Ed.2d 683 (1968). Accordingly, "any state law that involves the state in the actual conduct of foreign affairs is unconstitutional." *Id.*

The only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power is *Zschernig v. Miller*, 389 U.S. 429, 88 S. Ct. 664, 19 L.Ed.2d 683 (1968). *Zschernig* involved an Oregon statute providing that a nonresident alien could not inherit from an Oregon decedent unless certain conditions were met. *See id.* at 440, 88 S. Ct. 664. The Supreme Court struck down the Oregon statute on the ground that it had "more than 'some incidental or indirect effect in foreign countries.'" *Id.* at 434, 88 S. Ct. 664 (quoting *Clark v. Allen*, 331 U.S. 503, 516-17, 67 S. Ct. 1431, 91 L.Ed. 1633 (1947)).

By their own terms, the BAP Regulations apply only to vessels operating within Washington's territorial limits. *See* Wash. Rev. Code § 88.46.010. Intertanko objects to the potential *extraterritorial* impact of requirements that: (1) owners report hazardous events regardless of whether the events occur outside of Washington, *see* Wash. Admin. Code § 317-21-130; (2) crew training and drill programs be conducted, *see* Wash. Admin. Code § 317-21- 230; (3) personnel and record keeping procedures be administered, *see* Wash.

Admin. Code § 317-21-255; and (4) owner and operations management programs be followed, *see* Wash. Admin. Code § 317-21-260. However, Intertanko has failed to demonstrate that, even if these regulations have some extraterritorial impact, that impact is more than "incidental or indirect." *Zschernig*, 389 U.S. at 434, 88 S. Ct. 664. Accordingly, we reject Intertanko's argument that the BAP Regulations infringe upon the foreign affairs power of the federal government.

VII

We affirm in part and reverse in part the district court's grant of summary judgment in favor of the State of Washington. We reverse the district court's holding that Wash. Admin. Code § 317-21-265 is not preempted by federal law. However, we affirm the district court's judgment as to all other challenged BAP Regulations. Each side shall bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-35010

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), PLAINTIFF-APPELLANT

AND

UNITED STATES OF AMERICA, INTERVENOR-APPELLANT

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON; CHRISTINE O. GREGOIRE, ATTORNEY GENERAL OF THE STATE OF WASHINGTON; BARBARA J. HERMAN, ADMINISTRATOR OF THE STATE OF WASHINGTON OFFICE OF MARINE SAFETY; DAVID MACEACHERN, PROSECUTOR OF WHATCOM COUNTY; K. CARL LONG, PROSECUTOR OF SKAGIT COUNTY; JAMES H. KRIDER, PROSECUTOR OF SNOHOMISH COUNTY; NORMAN MALENG, PROSECUTOR OF KING COUNTY, DEFENDANTS-APPELLEES

AND

NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL; OCEAN ADVOCATES, INTERVENORS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

[Nov. 24, 1998]

ORDER

Before: BROWNING and O'SCANNLAIN, Circuit Judges, and MARQUEZ,* District Judge.

Prior report: 148 F.3d 1053

The panel has unanimously voted to deny the petitions for rehearing. Judge Browning and Judge O'Scannlain have voted to reject the suggestions for rehearing en banc, and Judge Marquez so recommends.

The full court was advised of the suggestions for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused judges in favor of en banc consideration. Fed. R. App. P. 35.

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

GRABER, Circuit Judge, dissenting:

I respectfully dissent from the court's decision not to rehear this case en banc.

This is the first published appellate decision interpreting the preemptive effect of the Oil Pollution Act of

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* The Honorable Alfredo C. Marquez, Senior Judge, United States District Court for the District of Arizona, sitting by designation.

1990 (OPA 90). The preemptive effect of OPA 90 is an issue of exceptional importance to the coastal states within the Ninth Circuit. *See* Fed. R. App. P. 35(a)(2) (providing that en banc consideration is appropriate "when the proceeding involves a question of exceptional importance").[1]

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[1] *See also* Sarah A. Loble, *Intertanko v. Lowry: An Assessment of Concurrent State and Federal Regulation Over State Waters*, 10 U.S.F. Mar. L.J. 27, 72 (1997) ("The Ninth Circuit has the opportunity to remedy the imbalance created by the district court, which favored Washington state regulation at the expense of federal interests."); Charles L. Coleman, III, *Federal Preemption of State "BAP" Laws: Repelling State Borders in the Interest of Uniformity*, 9 U.S.F. Mar. L.J. 305, 356 (1997) ("To the extent that the recent decision of the U.S. District Court for the Western District of Washington in *Intertanko v. Lowry* is inconsistent with the foregoing conclusions, it is wrong in this author's view, and should be overturned in the pending appeal to the Ninth Circuit Court of Appeals.") (footnote omitted); Robert E. Falvey, *A Shot Across the Bow: Rhode Island's Oil Spill Pollution Prevention and Control Act*, 2 Roger Williams U. L. Rev. 363, 396 (1997) ("The court attempted to counter Intertanko's preemption argument by simply asserting that Intertanko's theory was largely foreclosed by the nonpreemptive language of OPA '90. In light of the preceding discussion this reasoning seems unpersuasive.") (citation, footnote, and internal quotation marks omitted); Matthew P. Harrington, *Necessary and Proper, but Still Unconstitutional: The Oil Pollution Act's Delegation of Admiralty Power to the States*, 48 Case W. Res. L. Rev. 1, 17 n.59 (1997) ("Congress seems to have had a somewhat more restrictive view of what was being preempted than did the district court in *Intertanko*."); Michael P. Mullahy, *States' Rights and the Oil Pollution Act of 1990: A Sea of Confusion?*, 25 Hofstra L. Rev. 607, 636-37 (1996) ("The issue of whether Washington state has the power to enact the BAP Standards will most likely be decided by the Supreme Court. . . . [T]he Washington BAP Standards should survive the constitutional analysis the Court will most likely perform.") (footnote omitted); Laurie L. Crick, *The Washington State BAP Standards: A Case Study in Aggressive Tanker Regulation*, 27 J. Mar. L. & Com. 641, 646 (1996) ("[I]t is possible that most, if not all, of the BAP Standards will be upheld."); Marva Jo Wyatt, *Navigating the Limits of State Spill Regulations: How Far Can They Go?*, 8 U.S.F. Mar. L.J. 1, 26 (1995) ("The current controversy over Washington's navigational regulations affecting oil pollution implicates some of the most fundamental principles of our republic and foreshadows an age-old conflict between federalism and states' rights.").

Additionally, although I do not suggest that the Washington regulations necessarily are invalid, the opinion's analysis is incorrect in two exceptionally important respects: (1) The opinion places too much weight on two clauses in Title I of OPA 90 that limit OPA 90's preemptive effect. (2) Portions of the opinion that discuss the Coast Guard regulations are inconsistent with Ninth Circuit and Supreme Court precedent. Those issues warrant en banc consideration even if the opinion's ultimate result proves to be correct, a question as to which I express no view.

APPLICATION OF OPA 90'S PREEMPTION CLAUSES

Congress enacted OPA 90 in response to the Exxon Valdez oil spill. OPA 90 combined numerous bills into one comprehensive Act with nine titles. Title IV contains measures designed, in part, to *prevent* oil spills, while Title I regulates *liability and compensation* for oil spills. Congress placed the two pertinent preemption provisions in Title I. Those provisions state:

> Nothing in this Act or the Act of March 3, 1851 shall—
>
> (1) affect, or be construed or interpreted as preempting, the authority of any State or

political subdivision thereof from imposing any additional liability or requirements with respect to—

(A) the discharge of oil or other pollution by oil within such State; or

(B) any removal activities in connection with such a discharge; or

(2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law.

Section 1018(a) of OPA 90 (codified at 33 U.S.C. § 2718(a)).

Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;

relating to the discharge, or substantial threat of a discharge, of oil.

Section 1018(c) of OPA 90 (codified at 33 U.S.C. § 2718(c)).

The opinion reasons that the "plain language" of those preemption clauses indicates that Congress intended for them to apply to the oil spill prevention measures in Title IV. *See The International Assoc. of Indep. Tanker Owners (Intertanko) v. Locke*, 148 F.3d 1053, 1060 (9th Cir. 1998) ("By its plain language, § 1018 applies not only to Title I but to the other eight Titles of OPA 90 as well."). *See also Sloan v. West*, 140 F.3d 1255, 1261 (9th Cir. 1998) ("If the intent of Congress is clear from the face of the statutory language, we must give effect to the unambiguously expressed Congressional intent."). The opinion bases its "plain language" holding on Congress' use of the term "this Act" in discussing the reach of the clauses. *Intertanko*, 148 F.3d at 1060. That reasoning is incomplete.

The term "this Act" does plainly indicate Congress' intention to embrace all of OPA 90. However, examining the term "this Act" does not end the analysis. Grammatically, because of its placement in the sentences that comprise the preemption clauses, the term says only that "[n]othing in this Act" shall affect certain things—but we still must consider the meaning of those certain things that "[n]othing in this Act" is allowed to affect. At their broadest, the preemption clauses provide that "[n]othing in this Act . . . shall in any way affect . . . the authority of . . . any State . . . to impose additional liability or additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil." § 1018(c).

That phrase, read as a whole, is ambiguous, because it plausibly can be understood in two ways. One

plausible way to read the phrase is that any state regulation designed to prevent an oil spill is a "requirement[] . . . relating to the discharge, or substantial threat of a discharge, of oil," because in the broadest sense a preventive measure "relates" to the thing being prevented. Another plausible way to read the phrase, however, is to embrace only state regulations that impose "requirements" pertaining specifically "to the discharge, or substantial threat of a discharge, of oil" once it has occurred. That is, if a discharge is being prevented, there never comes into being a "discharge, or substantial threat of a discharge, of oil." Under the latter, narrower reading, a preventive measure does not relate to an oil "discharge, or substantial threat of a discharge," because its very purpose is to *avert* an oil discharge, or substantial threat of discharge, and the specified condition of the sentence is never met.

In summary, Congress could have intended to allow any state regulation that might prevent an oil spill, or Congress could have intended a more limited reach. The opinion acknowledges the ambiguity in this provision, which it resolves by analyzing the objectives of Congress. *See Intertanko*, 148 F.3d at 1060 n.6 ("Like the phrase 'relating to' employed in § 1018(c), the phrase 'with respect to' used in § 1018(a) is clearly expansive. However, we decline to read § 1018's language according to its terms . . . since, as many a curbstone philosopher has observed, everything is related to everything else. Rather, in determining whether state oil-spill prevention laws 'respect' or 'relate to' the 'discharge of oil,' we must look to the objectives of OPA 90. Because one of the explicit objectives of OPA 90 is oil-spill prevention, § 1018

prevents anything in OPA 90 from preempting state laws in this field.") (citations and internal quotation marks omitted).

Contextual clues suggest, however, that Title I's preemption clauses do not apply to Title IV's prevention provisions. *See Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1198 (9th Cir. 1998) ("the meaning of statutory language, plain or not, depends on context") (citation and internal quotation marks omitted), *cert. denied*, 1998 WL 467389 (U.S. Nov. 9, 1998) (No. 98-237). First, Congress placed these preemption clauses in a Title that addresses only *liability and compensation* for oil spills that actually occur. That placement (especially considering the full wording of the clauses) suggests that Congress intended for the clauses to apply only to the provisions in that Title. A second contextual clue strengthens that inference: A separate section in Title IV contains its own preemption clause. *See* § 4202(c) (Title IV), codified at 33 U.S.C. § 1321(o)(2).[2] Moreover, sections in other Titles of OPA 90 include their own preemption provisions as well. *See* § 5002(n) (Title V), codified at 33 U.S.C

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[2] In section 4202(c), OPA 90 amended 33 U.S.C. § 1321(o)(2), a preexisting provision of the Federal Water Pollution Control Act. The amendment is emphasized below.

> Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State, *or with respect to any removal activities related to such discharge.*

2732;[3] § 8202 (Title VIII), codified at 43 U.S.C. § 1656(e).[4] There would have been little or no need for additional preemption clauses if the clauses in Title I were comprehensive. Indeed, the opinion's broad reading of the preemption clauses in § 1018 would render the other OPA 90 preemption provisions largely superfluous, a result that this court generally avoids. *See Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996) ("We have long followed the principle that statutes should not be construed to make surplusage of any provision.") (citation and internal quotation marks omitted).

Context, however, does not resolve the textual ambiguity definitively. In the face of an ambiguity not resolved by examining text and context, this court generally turns to a statute's legislative history. *See*

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[3] Section 5002(n) provides in part:

> Nothing in this section shall be construed as modifying, repealing, superseding, or preempting any municipal, State or Federal law or regulation, or in any way affecting litigation arising from oil spills or the rights and responsibilities of the United States or the State of Alaska, or municipalities thereof, to preserve and protect the environment through regulation of land, air, and water uses, of safety, and of related development.

[4] Section 8202(e) provides:

> (1) Nothing in this section shall be construed or interpreted as preempting any State or political subdivision thereof from imposing any additional liability or requirements with respect to the discharge, or threat of discharge, of oil or other pollution by oil.
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> (2) Nothing in this section shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to discharges of oil.

Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998), *as amended* 1998 WL 727476, at *3 (9th Cir. 1998) (in construing a federal statute's preemptive effect, noting the general principle that resort to legislative history is appropriate when Congress' intent is not clear from an examination of the statutory text). *See also Moyle v. Director, Office of Workers' Compensation Programs*, 147 F.3d 1116, 1120 (9th Cir. 1998) ("[I]f the statute is ambiguous, we consult the legislative history, to the extent that it is of value, to aid in our interpretation.") (citation and internal quotation marks omitted). Here, the legislative history is of value.

OPA 90's preemption clauses originated in the Senate's Oil Pollution Liability and Compensation Bill of 1989.[5] The Senate intended for that bill to "con-

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[5] The original draft provided:

> (a) Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the discharge of oil or other pollution by oil within such State. Nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to discharges of oil.
>
> (b) Nothing in this Act or in section 9507 of the Internal Revenue Code of 1954 shall in any way affect, or be construed to affect, the authority of any State—
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> (1) to establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or
>
> (2) to require any person to contribute to such a fund.

solidate and improve Federal laws providing compensation and establishing liability for oil spills." S. Rep. No. 101-94, at 1 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723. That bill did not include Title IV's oil pollution prevention provisions at all. *See* 135 Cong. Rec. S3241-46 (daily ed. Apr. 4, 1989).

The Senate drafted a separate bill, the Oil Tanker Navigation Safety Bill of 1989, that included provisions regarding the prevention of oil spills, including some provisions similar to those that eventually appeared in Title IV. *See* S. Rep. No. 101-99, 3-4 (1989), *reprinted*

(c) A State may enforce, on the navigable waters of such State, the requirements for evidence of financial responsibility applicable under section 104 of this Act.

(d) The President shall consult with the affected State or States on the appropriate removal action to be taken. Removal with respect to any discharge or incident shall be considered completed when so determined by the President and the Governor or Governors of the affected State or States.

(e) Nothing in this Act, the Act of March 3, 1851, as amended (46 U.S.C. 183 et seq.), or section 9507 of the Internal Revenue Code of 1954, shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law,

relating to the discharge, or substantial threat of a discharge, of oil.

135 Cong. Rec. S3245 (daily ed. Apr. 4, 1989).

in 1990 U.S.C.C.A.N. 752.[6] That bill contained its own preemption clause. *See* 135 Cong. Rec. S9332 (daily ed. Aug. 2, 1989).[7] *See* also S. Rep. No. 101-99, at 21, *reprinted in* 1990 U.S.C.C.A.N. at 770.

The Senate added some of the preventive provisions from the Oil Tanker Navigation Safety Bill to the Oil Pollution Liability and Compensation Bill. *See* 135 Cong. Rec. S9678 (daily ed. Aug. 3, 1989); 135 Cong. Rec. S10406-07 (daily ed. Aug. 15, 1989). Specifically, the Senate added the provisions relating to alcohol testing and crew placement, which it put in Title III. *See* 135 Cong. Rec. S10406. The Senate also added the preemption clause from the Oil Tanker Navigation Safety Bill to that Title (§ 310), and it limited the reach of the preemption clause to the oil spill prevention provisions in that Title. *See id.* at S10415-S10417.[8] That modified bill did not alter the Oil Pollution Liability and Compensation Bill's preexisting preemption clauses found in the oil spill *liability and compensation*

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[6] Specifically, Title III of that bill included provisions requiring (a) alcohol testing of tanker personnel and (b) the placement of four crew members on the navigation bridge of a tanker. *Id.*

[7] That clause provided:

Nothing in this Act shall be construed or interpreted as changing, diminishing, or preempting in any way the authority of a State, or any political subdivision thereof, to regulate oil tankers or to provide for oil spill liability or contingency response planning and activities in State waters.

[8] Section 310 provided:

Nothing in this title shall be construed or interpreted as changing, diminishing, or preempting in any way the authority of a State, or any political subdivision thereof, to regulate oil tankers in State waters.

Id. at S10417.

title of the amended bill (Title I, Section 106). *Id.* at S10412.

Although the Senate's final bill contained some oil spill prevention measures, Title IV originated in the House of Representatives in the Oil Pollution, Prevention, Response, Liability and Compensation Bill of 1989. In drafting that bill, the House generally chose to preempt, rather than to allow, state regulation. *See* Congressional Quarterly Almanac, 102d Cong., 2d Sess., p. 283 (1990) (noting the "House's insistence on a provision to pre-empt strict state laws"). Specifically, the House's preemption provision allowed states only to establish or maintain an oil spill fund and "to impose, or to determine the amount of, any fine or penalty." *See* Cong. Rec., 101st Cong., Vol. 135, part 20, 27827, 27947 (bound ed. Nov. 8, 1989).[9]

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[9] Section 1018 of the House version provided:

(a) PREEMPTION

(1) ACTIONS PREEMPTED.—Except as provided in this Act and the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), no action arising out of a discharge of oil, or a substantial threat of a discharge of oil, from a vessel or facility into or upon the navigable waters or adjoining shorelines or the exclusive economic zone (other than an action for personal injury or wrongful death), may be brought in any court of the United States or of any State or political subdivision thereof.

(2) STATE FUNDS AND ACCOUNTS.—Nothing in this Act or in sections 4611 and 9509 of the Internal Revenue Code of 1986 shall affect the authority of any State (A) to establish or continue in effect an oil spill fund or account; or (B) to require any person to contribute to that fund or account.

(b) NO PREEMPTION OF PENALTIES.—Nothing in this Act or section 9509 of the Internal Revenue Code of 1986 shall affect the authority of the United States or any State or

After vigorous debate, the House eventually amended its preemption provisions and adopted wording similar to that found in the Senate's § 106 preemption clauses.[10] *See* 135 Cong. Rec. H8165 (daily ed. Nov. 8, 1989). However, the debate made clear that the House intended for the preemption clauses to apply

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political subdivision thereof to impose, or to determine the amount of, any fine or penalty for any violation of law relating to an incident.

(c) LIMITATION OF LIABILITY ACT.—The Act of March 3, 1851, shall not apply to removal costs and damages that directly result from an incident involving the discharge or substantial threat of discharge of oil.

[10] The amended House version of § 1018 provides in part:

(a) PRESERVATION OF STATE AUTHORITIES.—

(1) Notwithstanding any other provision, nothing in this Act or the Act of March 3, 1851 shall—

(A) be construed or interpreted as preempting any state or political subdivision thereof from imposing any additional liability or requirements with respect to the discharge of oil or other pollution by oil within such state; or

(B) affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or state law, including common law.

(2) Nothing in this Act or in sections 4611 or 9509 of the Internal Revenue Code of 1986 shall affect or be construed to affect the authority of any state or political subdivision thereof—

(A) to establish or to continue in effect a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or

(B) to require any person to contribute to such a fund.

135 Cong. Rec. 156 H8128-29 (daily ed. Nov. 8, 1989).

only to OPA 90's oil spill *liability and compensation* provisions. *Compare id.* at H8129 (Nov. 8, 1989) (statement of Rep. Miller) ("The amendment that I am offering on behalf of myself and the gentleman from Massachusetts [Mr. Studds] is an amendment to correct a glaring flaw in H.R. 1465, by preserving the rights of States to set higher standards for *oil pollution liability and* more complete systems of *compensation* than are allowed under this bill or under current law.") (emphasis added) *with id.* (statement of Rep. Hammerschmidt) ("I had thought that the issue of concern centered around whether *State liability* laws should be preempted. That is not the only issue presented by this amendment. This amendment goes much further. It would remove provisions in the bill addressing the need for a uniform system of *financial responsibility*. The system of *liability and compensation* in the bill is intended to be comprehensive and definite.") (emphasis added).

In summary, before Congress held its Conference Committee, the Senate had a bill with: (a) a preemption clause in its oil pollution liability and compensation title (Title I, § 106); and (b) some oil spill prevention provisions in Title III, which had their own specific preemption provision (§ 310). The House, where most of Title IV originated, had only one preemption provision (§ 1018), which was similar to the Senate's § 106 and which the House intended to apply only to oil spill liability and compensation.

The Conference Committee deleted the Senate's § 310 preemption clause that applied to oil spill prevention measures. Moreover, the Conference Committee relied only on the Senate's § 106 and the House's

§ 1018 when drafting the final preemption clauses. *See* H.R. Conf. Rep. No. 101-653, pp. 121-22 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 799-800 ("Section 106 of the Senate amendment and section 1018 of the House bill are generally similar provisions. . . . The Conference substitute blends the provisions of the House and Senate bills, and adds a new subsection (d) pertaining to the liability of Federal employees.").[11] The Conference Committee's deletion of the only preemption clause that applied specifically to oil spill prevention, and its reliance instead on two provisions that never applied to prevention provisions, together suggest that Congress did not intend its final version of § 1018 to apply to OPA 90's oil spill prevention provisions (Title IV).

Under all the circumstances, Congress' choice of wording and its decision to place the preemption clauses in Title I suggest that it intended for those clauses to apply only to Title I and its liability and compensation provisions. *See, e.g., National Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atlantic Corp.*, 924 F.Supp. 1436, 1448 (E.D.Va.1996) ("The purpose behind the savings clause is to allow the states to impose liability upon oil polluters above the liability imposed through OPA. Congress wanted to give the states the power to force polluters to cleanup completely oil spills and to compensate the victims of oil spills, even if their liability for these remediation expenses is limited under OPA."), *aff'd*, 122 F.3d 1062 (4th Cir. 1997) (Table), *cert. denied*, — U.S. ——, 118 S.

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[11] The Conference Committee also indicated its intent "not to disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S. Ct. 988, 55 L.Ed.2d 179 (1978)." *Id.*

Ct. 1301, 140 L.Ed.2d 467 (1998). The opinion's method of analyzing Congress' intent is incomplete and, thus, the opinion's conclusion fails accurately to identify that intent.

PREEMPTIVE EFFECT OF COAST GUARD REGULATIONS

Relying on *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 106 S. Ct. 1890, 90 L.Ed.2d 369 (1986), the *Intertanko* opinion refuses to give preemptive effect to various Coast Guard regulations, because (1) Congress did not expressly delegate to the Coast Guard the power to preempt state law, and (2) OPA 90's pre-emption clauses implied the opposite Congressional intent. *See Intertanko*, 148 F.3d at 1068 ("*Congress did not explicitly or impliedly delegate to the Coast Guard the authority to preempt state law.* Indeed, § 1018 of OPA 90 establishes that nothing in OPA 90 may be construed as impairing the ability of the states to impose their own oil-spill prevention requirements. In view of Congress's unwillingness to preempt state oil-spill prevention efforts on its own, we find implausible the argument that it intended to delegate power to the Coast Guard to do so.") (citations and footnote omitted) (emphasis added). That analysis is inconsistent with Ninth Circuit and Supreme Court precedent.

Generally, an administrative agency's regulations have preemptive effect whenever Congress has authorized the agency to enact such regulations, not merely when Congress expressly has authorized the agency to preempt state law. *See City of New York v. FCC*, 486 U.S. 57, 64, 108 S. Ct. 1637, 100 L.Ed.2d 48 (1988) ("[A] pre-emptive regulation's force does not depend on express congressional authorization to displace state

law. Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.") (citation and internal quotation marks omitted); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154, 102 S. Ct. 3014, 73 L.Ed.2d 664 (1982) (making the same point).

Louisiana Pub. Serv. Comm'n is not to the contrary. There, the Supreme Court refused to give preemptive effect to an administrative agency's regulations, because Congress had *expressly denied* the administrative agency the power to enact the regulations. *See* 47 U.S.C. § 152(b) ("[N]othing in this chapter shall be construed to apply to or give the Commission [FCC] jurisdiction with respect to . . . intrastate communication service."); *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 360, 106 S. Ct. 1890 ("[T]he Act grants to the FCC the authority to regulate interstate and foreign commerce in wire and radio communication, while expressly denying that agency jurisdiction with respect to . . . intrastate communication service.") (citation and internal quotation marks omitted).

By contrast, OPA 90 did not deny the Coast Guard power to enact the regulations at issue here. Rather, Congress "*required* the Coast Guard to implement a wide range of oil-spill prevention rules" when it passed OPA 90. *Intertanko*, 148 F.3d at 1068 (emphasis added). *See* 33 U.S.C. §§ 2701-18 (so providing). Because the Coast Guard acted within its authority when it enacted the regulations, those regulations can have

preemptive effect, even though Congress did not expressly authorize the Coast Guard to preempt state law.

OPA 90's preemption clauses, allowing for some state involvement, do not alter that analysis. In *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), this court similarly faced a Congressional statute that allowed state involvement. *Id.* at 489 ("The above authorities demonstrate a congressional intent that there be joint federal/state regulation of ocean waters within three miles of shore."). Even though Congress had allowed state involvement, this court still analyzed whether the Coast Guard's regulations preempted state law. *See id.* at 499 ("Although we conclude that the objectives of the Alaska statute do not conflict with those of the Coast Guard regulations . . ., we must nevertheless determine whether the facts of this case as alleged or conceded by appellees reveal an irreconcilable conflict when the Alaska statute and Coast Guard regulations are applied concurrently in Alaska territorial waters."). *Accord Beveridge v. Lewis*, 939 F.2d 859, 864 (9th Cir. 1991). In summary, the opinion's treatment of the regulations is inconsistent with precedent.

CONCLUSION

For the foregoing reasons, I dissent from the court's decision to decline the suggestion for a rehearing en banc.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. C95-1096C

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), PLAINTIFF

v.

MIKE LOWRY, ET AL., DEFENDANTS

[Nov. 18, 1996]

ORDER

COUGHENOUR, District Judge.

This matter comes before the Court on cross-motions for summary judgment filed by plaintiff, defendants and intervenors. Having heard oral argument, and having reviewed the pleadings, memoranda, exhibits and other documents on file, the Court now finds and concludes as follows:

I. Background

This is a lawsuit brought by the International Association of Independent Tanker Owners ("Intertanko") against Washington State, certain state officials, and four county prosecutors. Intertanko seeks an order

declaring that certain Washington statutes and regulations pertaining to the operation of oil tankers in state waters are unconstitutional. Three environmental groups, the National Resources Defense Council, the Washington Environmental Counsel and Ocean Advocates, Inc., have intervened.

The marine waters of Washington include a rocky ocean coastline, the "inland sea" of Puget Sound, and the Strait of Juan de Fuca. These waters host ecosystems that are as rich and diverse as any in the world. These waters are also highly susceptible to damage from oil pollution. Puget Sound is particularly vulnerable because it is relatively confined and shallow. Puget Sound is also difficult to navigate due to vessel traffic, fog and natural obstructions.

Intertanko is a trade association with approximately 253 members and 152 associate members who own or operate tankers. Intertanko's members represent on a tonnage basis, approximately 80 percent of the world's independently owned tanker fleet. Intertanko members call at oil facilities in Puget Sound, and travel along the Columbia River to reach ports in Oregon.

Intertanko challenges several statutes and regulations that have been implemented by the state to prevent oil spills and thereby protect Washington waters. *See* RCW 88.46.010, *et seq.*, and WAC 317-21-010, *et seq.* Intertanko specifically asserts that RCW 88.46.010(2)-(3), and RCW 88.46.040(3) are preempted or otherwise invalidated by federal law. In order to transport oil in state waters, these statutes require tank vessel operators to file oil spill prevention plans. These plans must provide for the best achievable protection from damages caused by the discharge of oil,

and must comply with regulations adopted by the State Office of Marine Safety ("OMS").

Intertanko also asserts that 16 regulations promulgated by the OMS are invalid. These regulations lay out specific requirements that tanker vessel operators must satisfy to meet the best achievable protection standards in their prevention plans. These regulations may be summarized as follows:

1. Event Reporting—WAC 317-21-130. Requires operators to report all events such as collisions, allisions and near-miss incidents for the five years preceding filing of a prevention plan, and all events that occur thereafter for tankers that operate in Puget Sound.

2. Operating Procedures—Watch Practices—WAC 317-21-130. Requires tankers to employ specific watch and lookout practices while navigating and when at anchor, and requires a bridge resource management system that is the "standard practice throughout the owner's or operator's fleet," and which organizes responsibilities and coordinates communication between members of the bridge.

3. Operating Procedures—Navigation—WAC 317-21-205. Requires tankers in navigation in state waters to record positions every fifteen minutes, to write a comprehensive voyage plan before entering state waters, and to make frequent compass checks while under way.

4. Operating Procedures—Engineering—WAC 317-21-210. Requires tankers in state waters to

follow specified engineering and monitoring practices.

5. Operating Procedures—Prearrival Tests and Inspections—WAC 317-21- 215. Requires tankers to undergo a number of tests and inspections of engineering, navigation and propulsion systems twelve hours or less before entering or getting underway in state waters.

6. Operating Procedures—Emergency Procedures—WAC 317-21-220. Requires tanker masters to post written crew assignments and procedures for a number of shipboard emergencies.

7. Operating Procedures—Events—WAC 317-21-225. Requires that when an event transpires in state waters, such as a collision, allision or near-miss incident, the operator is prohibited from erasing, discarding or altering the position plotting records and the comprehensive written voyage plan.

8. Personnel Policies—Training—WAC 317-21-230. Requires operators to provide a comprehensive training program for personnel that goes beyond that necessary to obtain a license or merchant marine document, and which includes instructions on a number of specific procedures.

9. Personnel Policies—Illicit Drugs and Alcohol Use—WAC 317-21-235. Requires drug and alcohol testing and reporting.

10. Personnel Policies—Personnel Evaluation—WAC 317-21-240. Requires operators to monitor the fitness for duty of crew members, and requires

operators to at least annually provide a job performance and safety evaluation for all crew members on vessels covered by a prevention plan who serve for more than six months in a year.

11. Personnel Policies—Work Hours—WAC 317-21-245. Sets limitations on the number of hours crew members may work.

12. Personnel Policies—Language—WAC 317-21-250. Requires all licensed deck officers and the vessel master to be proficient in English and to speak a language understood by subordinate officers and unlicensed crew. Also requires all written instruction to be printed in a language understood by the licensed officers and unlicensed crew.

13. Personnel Policies—Record Keeping—WAC 317-21-255. Requires operators to maintain training records for crew members assigned to vessels covered by a prevention plan.

14. Management—WAC 317-21-260. Requires operators to implement management practices that demonstrate active monitoring of vessel operations and maintenance, personnel training, development and fitness, and technological improvements in navigation.

15. Technology—WAC 317-21-265. Requires tankers to be equipped with global positioning system receivers, two separate radar systems, and an emergency towing system.

16. Advance Notice of Entry and Safety Reports—WAC 317-21-540. Requires at least twenty-

four hours notice prior to entry of a tanker into state waters, and requires that the notice report any conditions that pose a hazard to the vessel or the marine environment.

Intertanko relies on a number of federal statutes, regulations and international treaty obligations to assert that the state statutes and regulations improperly intrude into a field controlled by the federal government. Most of the federal law relied on by Intertanko is derived from the Tank Vessel Act of 1936, the Ports and Waterways Safety Act of 1972 ("PWSA"), the Port and Tanker Safety Act of 1978 ("PTSA")[1], and the Oil Pollution Act of 1990 ("OPA 90")[2]. The progressive passage of these acts by Congress either added to or amended prior law regarding the regulation of oil tankers. The provisions of these acts are largely found in Titles 33 and 46 of the United States Code. These laws impose specific requirements for tankers or delegate to the Coast Guard the responsibility for promulgating specific standards.

Intertanko also relies on a handful of treaties to which the United States has acceded. These include the International Convention for the Safety of Life at Sea, 1974 ("SOLAS"), the International Convention for the Prevention of Pollution from Ships, 1973, and the Protocol of 1978 ("MARPOL"), the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978 ("STCW"), and the International Regulation for Preventing Collisions at

[1] These two acts are often referred to together as the "PWSA/PTSA."

[2] Pub. L. No. 101-380, 104 Stat. 486 (August 18, 1990).

Sea, 1973 ("COLREGS"). These treaties have all been signed and ratified by the United States.[3]

II. Discussion

This case tests the extent to which Washington State may protect its marine environment by regulating oil tankers in the areas of operations, personnel, management, technology and information reporting. Although protection of the marine environment has historically been within the reach of the police powers of the states, shipping has traditionally been governed by federal law. Thus the Washington oil spill prevention statutes and regulations overlap requirements imposed by the federal government. This overlap creates a tension between the power of the state and the power of the federal government.

Intertanko seeks to resolve this tension. Intertanko argues that the Washington oil spill prevention statutes

[3] A treaty cannot, however, have any impact on domestic laws unless it is self-executing, or unless its terms are enacted as parts of statutes or administrative regulations. *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985). There are at least four relevant factors to be considered when determining whether a treaty is self-executing: "(1) 'the purposes of the treaty and the objectives of its creators,' (2) 'the existence of domestic procedures and institutions appropriate for direct implementation,' (3) 'the availability and feasibility of alternative enforcement methods,' and (4) 'the immediate and long range social consequences of self- or non-self-execution.'" *Id.* (quoting *People of Saipan v. United States Department of Interior*, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003, 95 S. Ct. 1445, 43 L.Ed.2d 761 (1975)). Intertanko has not addressed these four factors in asserting that the treaties it relies upon are self-executing. Intertanko has, however, identified where these treaties have been implemented by federal statute and regulation.

and regulations are preempted by federal statutes and regulations, and by federal treaty obligations through the Supremacy Clause of the United States Constitution. It also argues that the oil prevention statutes and regulations violate the Foreign Affairs Clause of the Constitution and the Commerce Clause of the Constitution. In addition, it asserts that the regulations are invalid because they reach beyond the three mile territorial limit of the navigable waters of Washington State.

Intertanko moves for summary judgment and asks the Court to enjoin the enforcement of the oil spill prevention laws. Defendants and intervenors move for summary judgment dismissing Intertanko's complaint. Because the resolution of this case depends almost exclusively on questions of law, there are no genuine issues of material fact and Intertanko's claims may be fully litigated on summary judgment. Fed. R. Civ. P. 56.

A. Preemption

"[W]hen a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S. Ct. 988, 994, 55 L.Ed.2d 179 (1978). Explicit preemption is present when Congress so declares. *Id.* Implicit preemption is present if the scheme of federal regulation is so pervasive as to indicate that Congress left no room for state action. *Id.* It may also be inferred when "the federal interest is so dominant that the federal system will be assumed to

preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447 (1947).

In those cases where Congress has not totally foreclosed state regulation, a state statute is preempted if it conflicts with a federal statute. *Ray*, 435 U.S. at 158, 98 S. Ct. at 994. "A conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . .,' or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217, 10 L.Ed.2d 248 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L.Ed. 581 (1941)).

Express and implied preemption do not require that state and federal rules conflict. A state rule may be preempted under these theories when it is different than the federal rule. The state and federal rule must, however, be at odds for conflict preemption to apply.

1. Oil Pollution Act of 1990

As an initial matter, defendants and intervenors assert that OPA 90 expressly prohibits the preemption of state oil spill prevention laws. Congress passed OPA 90 soon after the Exxon Valdez oil spill in Prince William Sound. The Act addresses oil pollution liability, compensation, prevention and removal.

Defendants and intervenors rely on OPA 90 § 1018, which is codified at 33 U.S.C. § 2718. Section 1018 of the Act states in relevant part:

(a) PRESERVATION OF STATE AUTHORITIES; SOLID WASTE DISPOSAL ACT—Nothing in this Act . . . shall—

> (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—
>
> (A) the discharge of oil or other pollution by oil within such State; or
>
> (B) any removal activities in connection with such a discharge;
>
> * * * * * *

(c) ADDITIONAL REQUIREMENTS AND LIABILITIES, PENALTIES—Nothing in this Act . . . shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—

> (1) to impose additional liability or additional requirements; or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;

relating to the discharge, or substantial threat of a discharge, of oil.

Defendants and intervenors claim that this language recognizes the right of states to impose additional requirements to prevent oil spills. The starting point

for statutory interpretation is consideration of the language employed by Congress, and consideration of the statute as a whole, including its history and purposes. *United States v. van den Berg*, 5 F.3d 439, 442 (9th Cir. 1993).

The language of section 1018 is best understood when the Act as a whole is considered. Section 1018 of OPA 90 is located in "Title I—Oil Pollution Liability and Compensation." Title I of OPA 90 sets the standards for liability and damages for the discharge of oil or the substantial threat of discharge of oil into the navigable waters of the United States. The Act also includes "Title IV—Prevention and Removal." This title sets standards for tanker personnel qualifications, manning, operations, design and construction. It also directs the President to prepare a National Contingency Plan for the removal of oil, and to require tank vessel operators to prepare individual response plans for the removal of oil.

The language of the savings clause relied on by defendants and intervenors applies broadly to "this Act," which includes oil pollution liability, compensation, prevention and removal requirements. It makes clear that states are not preempted from adding additional "requirements with respect to . . . the discharge of oil," or "relating to the discharge . . . of oil." Because the Act comprehensively addresses oil discharge liability, compensation, prevention and removal, all provisions of the Act must be "with respect to" or "relating to" the discharge of oil. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 111 S. Ct. 478, 483, 112 L.Ed.2d 474 (1990) (a law relates to a subject when it has a connection with or reference to

that subject). Pursuant to the broad language of section 1018, it follows that none of the provisions of OPA 90 preempt the ability of the states to add to federal requirements in the areas addressed by the Act.

Intertanko's assertion that the savings clause is limited to liability, compensation, and removal, but not prevention, is not supported by the broad language employed in section 1018. Moreover, Intertanko's assertion that the nonpreemption language is limited in its application by its placement in Title I is refuted by the explicit allowance in section 1018 for additional state regulation of "removal activities." Removal activities are regulated not in Title I, but in Title IV along with prevention standards. Thus the savings clause cannot be limited to Title I, but must also include Title IV.

In addition, Intertanko's assertion that applying the savings clause to the prevention requirements would run afoul of international standards is undermined by other provisions in the Act. Foremost is the requirement that oil tankers have double hulls. 46 U.S.C. § 3703a. This contradicts the international standards imposed by Regulation 13F to Annex I of MARPOL, and demonstrates that Congress was not overly concerned with maintaining uniformity with such standards. In addition, the Act clearly states that it is in the best interests of the United States to participate in an international regime "that is at least as effective as Federal and State laws in preventing incidents . . ." OPA 90 § 3001.[4] This anticipates that federal and state

[4] Although this statement relates only to liability and removal regimes, it supports the view that Congress did not intend the provisions of OPA 90 to be limited by international standards.

laws may be more effective than international standards.

The application of the savings clause to prevention regulations is also supported by the legislative history of OPA 90. The Conference Report on the final version of OPA 90 explains the preemptory effect of the Act:

> Thus, subsection (a) of section 1018 of the substitute states explicitly that nothing in the substitute [bill] . . . shall affect in any way *the authority of the State or local government to impose additional liability or other requirements with respect to oil pollution* or to the discharge of oil within the State or with respect to any removal activities in connection with such discharge.

H.R. Conf. Rep. No. 101-653, 101st Cong., 1st Sess., p. 121 (1990), *reprinted in* 1990 U.S.C.C.A.N. 800 (emphasis added). This language reemphasizes that the Act broadly saves to states the ability to impose additional "requirements with respect to oil pollution."[5]

The impact of the savings clause on prevention standards is further highlighted by a letter to the Coast

[5] The Conference Report also stated that OPA 90 "does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company*, 435 U.S. 151, [98 S. Ct. 988, 55 L.Ed.2d 179] (1978)." The citation to *Ray* may mean that there was an intention not to eradicate the Court's holding that federal law impliedly preempted state tanker design and construction regulations. *Ray*, 435 U.S. at 163-64, 98 S. Ct. at 997-98. That would not create an issue in this case because none of the Washington regulations control design and construction. Moreover, if there is a conflict between a statute and legislative history, the statute prevails. *In re the Matter of Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989).

Guard Commandant from the Washington State Congressional Delegation dated September 28, 1993. That letter concerned the application of Washington's regulations to vessels passing through state waters to reach Canada. The delegation said "[w]e are extremely concerned with the Coast Guard's threats to void state oil prevention standards for these Canada-bound vessels. In the Oil Pollution Act of 1990 Congress provided that state laws, requirements and jurisdiction would not be preempted by federal law. The U.S. Coast Guard should not be obstructing the state's efforts to protect state waters."

The only other court to address the nonpreemption language of OPA 90 also concluded that the Act saved to states the ability to impose additional requirements with regard to all aspects of oil pollution liability, compensation, prevention and removal. In *Berman Enterprises, Inc. v. Jorling*, 793 F.Supp. 408, 414-16 (E.D.N.Y. 1992), aff'd, 3 F.3d 602 (2nd Cir. 1993), *cert. denied*, 510 U.S. 1073, 114 S. Ct. 883, 127 L.Ed.2d 78 (1994), the court examined a New York statute that required vessels to obtain a state license that among other things necessitated a showing that the vessel "'can provide necessary equipment to prevent, contain and remove discharges of petroleum.'" *Id.* at 411 (citing New York Navigation Law § 174(3)). The Court concluded that the OPA 90 savings clause made clear that the New York statute was not preempted. It concluded that the statute was actually an acceptance of "the federal government's invitation to provide additional means of enforcing the federal policy favoring clean water." *Id.* at 416.

In similar fashion, upon a review of the language, structure and legislative history of the Act, the Court concludes that OPA 90's express nonpreemption language applies to the Washington State regulations, which govern tanker operations, personnel, management, technology and information reporting. These regulations cover much of the same ground addressed by the prevention provisions of OPA 90, which set standards for tanker personnel qualifications, manning, operations, design and construction. The Act made clear that Congress places a high priority on reducing the threat of oil pollution, and that states may impose additional requirements to meet these goals.

2. <u>Implied Field Preemption</u>.

Intertanko's assertion that a majority of the challenged regulations are invalid under the theory of implied field preemption is largely foreclosed by the nonpreemption language of OPA 90. Implied field preemption is present if the scheme of federal regulation is so pervasive as to indicate that Congress left no room for state action, or if the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Ray*, 435 U.S. at 157, 98 S. Ct. at 994.

Intertanko primarily asserts that the comprehensive regulation of oil tankers by the Federal government leaves no room for state regulation, which is thus preempted. There can be no doubt that the areas addressed by the Washington oil spill prevention rules, which generally cover tanker operations, personnel, management, technology and information reporting, are also comprehensively regulated by federal statutes, regulations and treaty obligations. Comprehensive

regulation of an area alone, however, is not enough to infer preemption. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716-18, 105 S.Ct. 2371, 2376-78, 85 L.Ed.2d 714 (1985). There must be some additional showing that Congress intended the comprehensive nature of the regulation to foreclose state action.

In *Ray* the Supreme Court held that Congress impliedly occupied the field in the area of tanker design and construction. Among other things, the Court examined a Washington statute that required all oil tankers entering state waters to have certain standard safety features, including a minimum amount of horsepower, twin screws, and double hulls. *Ray*, 435 U.S. at 160, 98 S. Ct. at 995-96. The Court found that these state law requirements were impliedly preempted under the regime imposed by Title II of the PWSA.[6] It specifically examined 46 U.S.C. § 391a (1970 Ed., Supp. V), the provisions of which are now largely codified at 46 U.S.C. § 3703. With language similar to the current statute, the former version of section 3703 required the Coast Guard to issue regulations regarding the "design, construction, and operation" of tankers in order to protect "life, property, and the marine environment from harm." *Ray*, 435 U.S. at 161, 98 S. Ct. at 996.

Based on this statutory scheme the Court concluded that "Congress, insofar as design characteristics are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the

[6] Title I is now codified as amended in 33 U.S.C. §§ 1221-1232, and Title II is now codified as amended at 46 U.S.C. §§ 3701-3718.

United States." *Id.* at 163, 98 S. Ct. at 997. As a result, "Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements." *Id.* at 163-64, 98 S. Ct. at 997.

The Court also noted that states have more latitude outside the area of tanker design and construction. "Of course, that a tanker is certified under federal law as a safe vessel insofar as its design and construction characteristics are concerned does not mean that it is free to ignore otherwise valid state or federal rules or regulations that do not constitute design or construction specifications." *Id.* at 168-69, 98 S. Ct. at 1000.

In this regard, the *Ray* Court addressed the impact of Title I of the PWSA on a Washington State regulation that required tug escorts for tankers over 40,000 DWT when certain design requirements were not met. The Court noted that Title I of the PWSA provided that the Coast Guard "may" promulgate vessel operating requirements, which could impose certain vessel traffic services and systems, could require equipment necessary to follow these services and systems, could control vessel traffic by among other things specifying size and speed limitations, and could restrict vessel operations to those having the particular operating characteristics that are necessary for safety. *Id.* at 169-70, 98 S. Ct. at 1000. This authorization for Coast Guard action was codified at 33 U.S.C. § 1221 (1970 ed., Supp. V), and is currently located in large part at 33 U.S.C. § 1223.

The Court concluded that a tug escort provision was not a design requirement that would be subject to implied field preemption, but was instead an operating

rule "arising from the peculiarities of local waters that call for special precautionary measures." *Id.* at 171, 98 S. Ct. at 1001. Because with regard to operating rules, the PWSA authorized but did not require the Coast Guard to issue controlling regulations, the Court found no implied field preemption. *Id.* It also concluded that because the Coast Guard had not promulgated tug escort provisions for Puget Sound, there was no conflict between the state rule and federal law. *Id.* at 172, 98 S. Ct. at 1001-02.[7]

The Ninth Circuit has also examined the preemptive effect of federal shipping regulations. In *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), *cert. denied*, 471 U.S. 1140, 105 S. Ct. 2686, 86 L.Ed.2d 703 (1985), the court examined an Alaska statute that prohibited oil tankers from discharging ballast water that had been stored in oil tanker holds. Instead, the state statute required tankers to discharge such ballast water into on-shore processing facilities. Chevron claimed that the statute was preempted by title II of the PWSA/PTSA, which required the Coast Guard to issue regulations concerning deballasting. That authority exists today under 46 U.S.C. § 3703(a)(7).[8]

[7] The *Ray* Court also made clear that certain environmental laws were not preempted by federal shipping laws and regulations. It explained that states can still require federally certified vessels to conform to "'reasonable, nondiscriminatory conservation and environmental protection measures'" *Id.* (quoting *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 277, 97 S. Ct. 1740, 1748, 52 L.Ed.2d 304 (1977)); *see also Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 343, 93 S. Ct. 1590, 1601, 36 L.Ed.2d 280 (1973) ("sea-to-shore pollution [has been] historically within the reach of the police power of the States").

[8] It should be noted that section 3703(a)(7) is the successor to the statute that required the Coast Guard to promulgate regulations for the design and construction of tankers in *Ray*, which requirements were found to preempt Washington law. Thus a regulation mandated by 46 U.S.C. § 3703 does not automatically preempt state law.

The Coast Guard regulations concerning deballasting were less stringent than the Alaska statute.

The Ninth Circuit held that the federal statute and regulatory scheme did not impliedly preempt the state regulation concerning deballasting. *Id.* at 495. In reaching this decision, the court distinguished between the federal regulation of vessel "design characteristics," which were found to preempt state law in *Ray*, and the federal regulation of "pollutant discharges." *Hammond*, 726 F.2d at 488. It noted that the Supreme Court in *Ray* concluded that "'ship design and construction standards are matters for national attention,'" but that "[t]he subject matter of environmental regulation, on the other hand, has long been regarded by the Court as particularly suited to local regulation." *Id.* (quoting *Ray*, 435 U.S. at 166 n.15, 98 S. Ct. at 998 n.15). The Ninth Circuit classified the Alaska statute concerning the disposal of ballast water as an environmental regulation limiting the discharge of pollutants from tankers. *Id.* It concluded that while the statute was not subject to implied field preemption, it could be, but was not, subject to conflict preemption. *Id.* at 495, 501.

The Ninth Circuit also addressed the degree to which federal shipping regulations preempted state law in *Beveridge v. Lewis*, 939 F.2d 859 (9th Cir. 1991). At issue there was a municipal ordinance regulating moorage and anchorage in Santa Barbara Harbor. The court concluded that while the Coast Guard had

extensive authority to regulate the anchoring, mooring and movement of vessels under 33 U.S.C. § 1223, that was not enough to create implied preemption. It explained:

> Just as *Ray* refused to find implicit preemption and proceeded to discuss the *actual* conflicts between Washington's Tanker Law and federal regulations, we cannot hold that the PWSA occupies the entire field of regulation of anchorage and mooring. We cannot distinguish tanker (*Ray*) and pollution (*Chevron*) regulations from mooring restrictions. If both the Supreme Court and this circuit did not find Congress to have intended to preempt all local regulation by the PWSA in those areas, it is difficult to conceive how it could be found here.

Id. at 863. Moreover, the Court recognized that there is "congressional intent that 'there be joint federal/state regulation of ocean waters within three miles of shore.'" *Id.* at 864 (quoting *Chevron*, 726 F.2d at 489). The Court went on to find that there was no actual conflict between the municipal ordinance and federal law. *Id.* at 864-65.

From *Ray* and its progeny two levels of preemption for statutes and regulations like those at issue here may be distilled. These categories depend on the subject matter that is being regulated. State regulation of oil tanker design and construction is impliedly preempted by federal law. *Ray*, 435 U.S. at 163-64, 98 S. Ct. at 997-98. State regulation of tanker operations "arising from the peculiarities of local waters that call for special precautionary measures" is not subject to implied field preemption, but may not actually conflict with federal regulation. *Ray*, 435 U.S. at 171, 98 S. Ct. at 1001.

State regulation of water pollution is also not subject to implied field preemption, but may not actually conflict with federal regulation. *Chevron*, 726 F.2d at 495.

Here, the Washington regulations govern vessel operations in order "to protect the state's natural resources and waters . . ." RCW 88.46.010. To do so standards are imposed in the areas of tanker operations, personnel, management, technology and information reporting. These areas are much more akin to the operational tug escort provisions upheld in *Ray*, than to the design and construction requirements that were struck down in that case.[9] The state regulations arise "from the peculiarities of local waters that call for special precautionary measures." *Ray*, 435 U.S. at 171, 98 S. Ct. at 1001.

Moreover, these standards are intended to protect the environment, and thus are an exercise of the state's police powers. When vessels are involved, however, there is an unavoidable overlap between state and federal regulation. But when the concern is pollution,

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[9] A portion of the state statute struck down in *Ray* did include radar and navigational position locating systems. *Ray*, 435 U.S. at 160, 98 S. Ct. at 995-96. Such requirements are more aptly included as regulations under Title I of the PWSA/PTSA, 33 U.S.C. § 1223, which provides that the Coast Guard may establish vessel traffic services in navigable waters of the United States, and in doing so "may require vessels to install and use specified navigation equipment, communications equipment, electronic relative motion analyzer equipment, or any electronic or other device . . ." Thus the requirements for global positioning system receivers and two separate radar systems under WAC 317-21-265 should be considered equipment necessary for vessel operating procedures under 33 U.S.C. § 1223. These requirements are not subject to implied preemption.

the Ninth Circuit has recognized the need for "joint federal/state regulation of ocean waters within three miles of shore." *Chevron*, 726 F.2d at 489. This partnership was further verified by the nonpreemption clause of OPA 90. As such, the Court cannot conclude that the Washington oil spill prevention statutes and regulations are impliedly preempted.[10]

3. Express Preemption.

Intertanko hinges its claim of express preemption on several federal regulations issued by the Coast Guard, in which it is stated that the regulation is intended to preempt state law. As a general rule, "[f]ederal regulations have no less preemptive effect than federal statutes." *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022, 73

[10] Intertanko also argues that implied field preemption is necessitated because of the strength of the federal interest in maritime law uniformity. *See Rice*, 331 U.S. at 230, 67 S. Ct. at 1152. This argument is not sufficient on its own to justify a finding of implied field preemption. The Ninth Circuit has explained that "the general rule on preemption in admiralty is that states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system." *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1422 (9th Cir. 1990) (emphasis in original), *cert. denied*, 504 U.S. 979, 112 S. Ct. 2956, 119 L.Ed.2d 578 (1992). This statement recognizes that the federal interest in maritime law does not always preempt state law. Moreover, the touchstone for preemption is conflict with federal law or interference with uniformity. These tests lead back to the question of whether the federal regulation is sufficiently comprehensive in the field to prohibit conflict and to require uniformity. Moreover, any question about whether the need for uniformity creates implied preemption is foreclosed by OPA 90.

L.Ed.2d 664 (1982). Where Congress has directed an agency to exercise its discretion in regulating a field, the agency may issue regulations that preempt state law. *Id.* at 154, 102 S. Ct. at 3023. Such regulations may be effective so long as the agency has not exceeded the scope of its delegated authority, and has not acted in a manner that conflicts with the intent of Congress with regard to preemption as stated in the derivative statute or its legislative history. *Id.*

Intertanko alleges that one of the Washington oil spill prevention statutes, and five of the oil spill prevention regulations or subparts are expressly preempted by regulations issued by the Coast Guard.

In this instance, however, Congress did not intend to give the Coast Guard authority to preempt state law with regard to the prevention of oil spills. The nonpreemption language of OPA 90 § 1018 prohibits the Coast Guard from doing so. *See Fidelity Federal*, 458 U.S. at 154, 102 S. Ct. at 3023.

In the one regulatory statement where the Coast Guard attempted to reconcile OPA 90 and *Ray*, it misconstrued the law and overstated its authority to preempt. Intertanko argues that 33 C.F.R. § 155.225, which requires oil tankers to have certain emergency towing capabilities, expressly preempts WAC 317-21-265(2), which requires tankers to be equipped with an emergency towing system. When it promulgated the federal rule, the Coast Guard stated that:

This rule establishes regulations requiring certain vessels to carry discharge removal equipment. In [*Ray*], the Supreme Court found that vessel design and equipment standards fall within the exclusive province

of the Federal Government. The OPA 90 Conference Report explicitly says that provisions in section 1018 of OPA 90 preserving certain State authority are not meant to disturb this Supreme Court decision. Therefore, the Coast Guard intends this rule to preempt State action addressing the same subject matter.

Discharge Removal Equipment for Vessels Carrying Oil, 58 Fed. Reg. 67,995 (1993) (citation omitted). Because *Ray* required implied preemption only in the areas of tanker design and construction, and not with regard to equipment standards, the Coast Guard statement is inaccurate. Moreover, because a tow package is considered an item of discharge removal equipment, it is directly saved by the language of OPA 90 allowing states to impose additional requirements with respect to "any removal activities." OPA 90 § 1018(a)(1)(B). The Coast Guard was without authority to preempt state law with this regulation, or with the other regulations cited by Intertanko.

4. **Conflict Preemption.**

Intertanko also argues that some of the Washington regulations are in direct conflict with federal rules, and as such are preempted. Intertanko does not, however, identify any conflicts that require preemption. A state law is in conflict with and preempted by federal law (1) if compliance with both state and federal law is a physical impossibility or (2) if the state law stands as an obstacle to the accomplishment and execution of the full purpose and objective of Congress. *Ray*, 435 U.S. at 158, 98 S. Ct. at 994.

Intertanko identifies eight Washington regulations that parallel new requirements that are to be imposed

on February 1, 1997 pursuant to the 1995 amendments to the STCW. The new STCW requirements are being implemented by the Coast Guard through federal regulations. Intertanko asserts that there is a direct conflict because the state is requiring immediate implementation of these rules through its oil spill prevention regulations, rather than waiting until February 1, 1997. The state provisions cited by Intertanko require certain watch practices, navigation practices, training requirements for crew members, personnel evaluations, limitations on working hours, English language requirements, and management practices for the oversight of tankers. *See* WAC 317-21-200, 205(1)-(3), 230, 235, 240, 245 and 260.

First, to the extent that the Washington regulations require earlier implementation of the new STCW standards, compliance with state and federal law will not be a physical impossibility. *Ray*, 435 U.S. at 158, 98 S. Ct. at 994. Rather, early implementation will actually help operators be in compliance with the new STCW requirements when they become effective on February 1, 1997. Second, given the Congressional statement in OPA 90 as to the lack of preemption for additional, state imposed prevention requirements, the state regulations will not stand as an obstacle to the accomplishment and execution of the full purpose and objective of the new standards. *Id.* Indeed, the state regulations complement the federal goal of reducing "human error as a major cause of maritime casualties." Implementation of the 1995 Amendments to the STCW, 61 Fed. Reg. 13284 (March 26, 1996).[11]

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[11] Intertanko raises a similar complaint with regard to WAC 317-21-260(2), which requires vessel operators to have a manage-

Intertanko's emphasis on uniformity with international standards is also undercut by the Coast Guard's proposed rulemaking to implement the STCW. The Coast Guard explains that while it has tried to avoid "unnecessary additional requirements when international standards are being implemented. . . . In some cases, clear differences with the international scheme are retained to preserve continuity in the U.S. licensing system." 61 Fed. Reg. at 13285.

The same analysis holds true for the two federal regulations for which Intertanko alleges an actual conflict with state rules. Intertanko says that WAC 317-21-250, which requires that all masters and licensed deck officers be able to speak English, and be able to speak a language understood by subordinate officers and unlicensed crew, conflicts with 46 U.S.C. § 8702(b), which requires that 75 percent of the crew in each department on board be able to understand any order spoken by the officers. If, however, a vessel is in compliance with the state regulation, it will necessarily be meeting the less stringent requirements of federal law. Thus dual compliance is not impossible.

Intertanko also asserts that WAC 317-21-200(1), which requires that the navigation watch include two or three licensed deck officers, one of whom "may be a

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ment program, which meets the requirements of at least one of four international ship management regimes. One of these is the International Maritime Organization's International Safety Management Code ("ISM"). This code is to become mandatory for vessels operating in international trade on July 1, 1998. Intertanko alleges that the Washington regulations conflict because they require compliance prior to that date. Even if early compliance created an actual conflict, no such conflict would exist because the ISM is just one of four regimes tanker operators can follow.

state-licensed" pilot, conflicts with 46 U.S.C. § 8502, which permits the use of federal pilots on United States tankers participating in coastwide trades. There is no conflict in this instance because the Washington regulation does not require a state-licensed pilot to be used as a lookout.[12]

B. Commerce Clause.

Intertanko argues that the Washington oil spill prevention statutes and regulations unconstitutionally limit commerce. Two types of state regulations may violate the Commerce Clause: "(1) those that directly burden interstate commerce or that discriminate against out-of-state interests and (2) those that burden interstate transactions only incidentally." *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 395 (9th Cir.), *cert. denied*, 515 U.S. 1143, 115 S. Ct. 2580, 132 L.Ed.2d 830 (1995). Regulations in the first category are usually invalid unless the state can show that a legitimate local interest unrelated to economic protection is served and no less discriminatory alternative exists. *Id.* Those in the second category may be invalid if the challenging party can demonstrate that the incidental burdens on interstate and foreign commerce are clearly excessive in relation to the putative local benefits." *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir.), *cert. denied*, 513 U.S. 918, 115 S. Ct. 297, 130 L.Ed.2d 211 (1994).

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[12] As with the early implementation of the STCW standards, neither WAC 317-21-250 or 317-21-200(1) will prevent achievement of federal goals.

Intertanko alleges that the Washington oil spill prevention regime directly regulates commerce because tanker traffic by definition involves the interstate or international transportation of oil. The Ninth Circuit has explained, however, that a state law does not directly regulate interstate commerce merely because it concretely affects a business engaged in interstate commerce. *Kleenwell*, 48 F.3d at 396. If that were the case, any regulation that affected interstate commerce would be forbidden. *Id.* Rather, the term is used "to refer to regulations whose *central* purpose is to regulate commerce, usually in order to benefit local interests." *Id.* (emphasis in original). The Commerce Clause does not "invalidate state regulations whose primary purpose is to address a legitimate local concern and whose incidental effect is to regulate interstate commerce." *Id.*

The Washington oil spill prevention rules are not impermissibly aimed at regulating commerce, or otherwise impeding interstate trade to protect state business interests. The statutes and regulations are instead intended to protect local waters from pollution.

The statutes and regulations at issue are similar to the law upheld in *Kleenwell*. There, the state required waste haulers to obtain a certificate of public convenience and necessity in order to transport and dispose of waste. *Id.* at 393. A waste hauler challenged the certificate requirement as a direct burden on its interstate hauling of waste. *Id.* at 395-96. The court concluded that the purpose of the statute was not the regulation of commerce, but was instead the legitimate local concern of ensuring the safe disposal of solid waste. *Id.* at 398. It noted that Congress by statute

had "explicitly found that the field of solid waste collection is properly subject to state regulation." *Id.* Thus the Court found no direct regulation of commerce. *Id.*

In the present case oil tanker operators must file and obtain approval of an oil spill prevention plan in order to operate in state waters. RCW 88.46.040. The purpose of the requirement is to protect state waters and the marine environment, reduce the risk of a vessel casualty causing an oil spill, and to encourage procedures and technology that increase the safety of marine transportation and that protect the state's natural resources. WAC 317-21-010. To accomplish these goals the state requires operators to demonstrate through prevention plans that their oil tankers meet certain standards in the areas of tanker operations, personnel, management, technology and information reporting. In addition, Congress through the passage of OPA 90 § 1018 made clear that the states could regulate these areas in order to prevent oil spills. As in *Kleenwell*, the Washington oil spill prevention statutes and regulations do not directly regulate commerce in violation of the Commerce Clause.

There may still, however, be a Commerce Clause violation if "the incidental burdens on interstate and foreign commerce imposed by the Washington rules are clearly excessive in relation to the putative local benefits." *Pacific Northwest Venison Producers*, 20 F.3d at 1012. Intertanko must show that the burdens that the regulations impose on interstate commerce "clearly outweigh" the local benefits. *Kleenwell*, 48 F.3d at 399.

Intertanko has not submitted sufficient evidence to make this showing.[13] It asserts that the cost to date for a single tanker operator to develop, file and maintain an oil spill prevention plan has been about $12,000 and that the cost of installing the emergency towing package required by the rules will be about $80,000. These are relatively small amounts compared to the average operating cost of a tanker, which is between $13.6 and $19 million for U.S. flag tankers, and between $8.4 and $12 million for non-U.S. flag tankers.

The costs of implementing a plan are also quite small when compared to the cost of an oil spill. The state reports that the estimated average cost of clean-up for four major oil spills in Washington between 1984 and 1988 was $6.3 million, and that the estimated impact on natural resources for each spill ranged between $2.2 and $8.1 million.

Given the relatively minimal cost of compliance as compared to the cost of an oil spill, Intertanko cannot demonstrate that the incidental burdens on interstate and foreign commerce are clearly excessive in relation to the benefit offered by the oil spill prevention statutes and regulations. This benefit is derived from the state's promulgation of what all agree to be more stringent and protective regulations. Moreover, because of the wide

[13] Intertanko also argues that because this matter concerns international commerce, the Court must give additional scrutiny to determine whether the regulations might impair uniformity where under federal law uniformity is essential. *See Pacific Northwest Venison Producers*, 20 F.3d at 1014. Intertanko's uniformity concern is, however, misplaced. Congress through OPA 90 § 1018 has clarified that additional state oil spill prevention regulations are appropriate.

disparity in costs associated with prevention as compared to the impact of an oil spill, only a slight amount of additional protection need be achieved for the statutory scheme to have succeeded. As a result, Intertanko has not presented sufficient facts to prove an inequitable balance such that a Commerce Clause violation is present.[14]

C. **Foreign Affairs Clause**.

Intertanko also argues that the Washington oil spill prevention rules violate the Foreign Affairs Clause of the Constitution because they allow the state to contravene important international treaty agreements, and interfere with the federal government's ability to enter into such agreements. State regulations may not impair the effective exercise of the nation's foreign policy. *Zschernig v. Miller*, 389 U.S. 429, 440, 88 S. Ct. 664, 670-71, 19 L.Ed.2d 683 (1968) (invalidating Oregon statutes that prevented foreign heirs from receiving property depending on the judgment of the state as to the propriety of the foreign country's domestic law). Thus "any state law that involves the state in the actual

[14] The Court recognizes that defendants and intervenors did not in their motions for summary judgment address the Commerce Clause claim. They did, however, argue in response to Intertanko's motion for summary judgment that the Commerce Clause claim could not be sustained. And in arguing the merits of the Commerce Clause claim, no party asserted the presence of genuine issues of material fact. As a result, the Court construes the arguments of defendants and intervenors to be akin to cross-motions for summary judgment. Moreover, settled precedent allows the entry of summary judgment to a non-moving party. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 313 (9th Cir. 1982). The Court reaches the same conclusion with regard to Intertanko's extraterritorial claim. *See infra*, at 1500-01.

conduct of foreign affairs is unconstitutional." *Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903, 913 (3rd Cir. 1990), *cert. denied*, 501 U.S. 1212, 111 S. Ct. 2814, 115 L.Ed.2d 986 (1991).

It is rare, however, that a state statute is invalidated because it intrudes into the area of foreign affairs. *Id.* ("[o]n only one occasion has the Supreme Court struck down a state statute as violative of the foreign relations power"). This is not such a case. Washington State is not acting in the federal government's place vis-a-vis a foreign or international body, but is instead exercising its police power by regulating both foreign and domestic tankers to protect the environment. Moreover, the state's decisions in this area are not keyed to any judgment as to the worthiness of a foreign regime. *See Trojan*, 916 F.2d at 903. Intertanko's Foreign Affairs Clause challenge cannot be sustained.

D. Extraterritorial Impact of Regulations.

Intertanko argues that the regulations impose obligations on tanker operators that go beyond the three-mile limit of Washington territorial waters, which is set by the Washington Constitution. Wash. Const. Art. XXIV, § 1 (setting state boundaries). It relies on *State ex rel. Luketa v. Pollock*, 136 Wash. 25, 29, 239 P. 8 (1925), which confirmed that "the jurisdiction and dominion of the state extends to the three-mile limit off shore as defined in the constitution . . ."

The Washington statutes and regulations at issue by definition regulate tanker operations in Washington waters. The legislature made it unlawful for a covered vessel to operate in Washington waters without an approved prevention plan. RCW 88.46.080, .090.

Owners and operators must submit prevention plans for their tank vessels. RCW 88.46.040(1). A Tank vessel, in turn, is defined as a ship that carries oil and that "[o]perates on the waters of the state." RCW 88.46.010. There is accordingly no direct assertion of jurisdiction over vessels outside of Washington waters.

Intertanko objects, however, to the incidental effects of the regulations. It objects to the requirements that owners report hazardous events even if the events occur outside of Washington, that owners use a bridge resource management system while in Washington waters that is the standard for the vessels in its fleet that operate in Washington[15], that certain crew training and drill programs be conducted, that certain personnel evaluation and record keeping requirements be administered, and that certain owner and operations management programs be followed. The Court agrees with the state, however, that while some of these activities are likely to occur outside of Washington, such occurrences are not mandated.

Moreover, the Supreme Court has upheld state police power regulations that incidentally and indirectly affect interstate or foreign commerce outside of state waters. *See Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 426, 56 S. Ct. 513, 515, 80 L.Ed. 772 (1936) (denying

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[15] "The bridge resource management system must be standard practice throughout the owner's or operator's fleet." WAC 317-21-200(2). "'Fleet' means more than one tank vessel operated by the same owner or operator." WAC 317-21-060(5). "Tank vessel" means a ship that carries oil and that "[o]perates on the waters of the state." WAC 317-21-060(11). Thus application of the bridge resource management system to the "fleet" affects only those vessels that operate in Washington.

challenge to California law restricting the use of sardines caught outside of state waters). In addition, the Washington Supreme Court has upheld the authority of the state to prohibit the possession or transportation of salmon taken from beyond the state's three-mile limit. *Frach v. Schoettler*, 46 Wash.2d 281, 290, 280 P.2d 1038 *cert. denied*, 350 U.S. 838, 76 S. Ct. 75, 100 L.Ed. 747 (1955).[16] Although these cases deal with fisheries rather than the prevention of oil pollution, the principle remains the same. Some incidental impact on extraterritorial activities is permitted to protect state resources. Intertanko's extraterritorial challenge falls short.

III. Conclusion

The Court concludes that the Washington oil spill prevention statutes and regulations are constitutionally valid. These statutes and regulations are not preempted by federal law, do not violate the Commerce Clause or the Foreign Affairs Clause of the Constitution, and are not improper extraterritorial restrictions. Rather, the oil spill prevention laws legitimately protect Washington's delicate and valuable marine resources through the exercise of the state's police powers.

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[16] Intervenors point out that 16 U.S.C. § 1856(a)(3) now prohibits a state from "directly or indirectly regulat[ing] any fishing vessel outside its boundaries, unless the vessel is registered under the law of that State." No similar proscription has been placed on the state's ability to prevent pollution. Rather, OPA 90 has made clear that states have authority to issue oil spill prevention regulations.

Therefore, the motions for summary judgment filed by defendants and intervenors are GRANTED and the motion for summary judgment filed by Intertanko is DENIED. This action is hereby DISMISSED and the Clerk of the Court is directed to enter judgment accordingly.[17]

SO ORDERED.

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[17] The issues raised in defendant Krider's motion for summary judgment were previously ruled on by the Court in the July 3, 1996 Order denying his motion to dismiss. Accordingly, his motion for summary judgment is DENIED. Plaintiff Intertanko's motion to supplement the summary judgment record is GRANTED.

APPENDIX D

Article VI, Clause 2, of the United States Constitution (the Supremacy Clause) provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX E

1. Article VI of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention) provides:

Certificates

(1) Certificates for masters, officers or ratings shall be issued to those candidate[s] who, to the satisfaction of the Administration, meet the requirements for service, age, medical fitness, training, qualification and examinations in accordance with the appropriate provisions of the annex to the Convention.

(2) Certificates for masters and officers issued in compliance with this article shall be endorsed by the issuing Administration in the form as prescribed in regulation I/2 of the annex. If the language used is not English, the endorsement shall include a translation into that language.

2. Article X of the STCW Convention provides:

Control

(1) Ships, except those excluded by article III, are subject, while in the ports of a Party, to control by officers duly authorized by that Party to verify that all seafarers serving on board who are required to be certificated by the Convention are so certificated or hold an appropriate dispensation. Such certificates shall be accepted unless there are clear grounds for believing that a certificate has been fraudulently obtained or that the holder of a certificate is not the person to whom that certificate was originally issued.

(2) In the event that any deficiencies are found under paragraph (1) or under the procedures specified in regulation I/4, "Control procedures", the officer carrying out the control shall forthwith inform, in writing, the master of the ship and the Consul or, in his absence, the nearest diplomatic representative or the maritime authority of the State whose flag the ship is entitled to fly, so that appropriate action may be taken. Such notification shall specify the details of the deficiencies found and the grounds on which the Party determines that these deficiencies pose a danger to persons, property or the environment.

(3) In exercising the control under paragraph (1), if, taking into account the size and type of the ship and the length and nature of the voyage, the deficiencies referred to in paragraph (3) of regulation I/4 are not corrected and it is determined that this fact poses a danger to persons, property or the environment, the Party carrying out the control shall take steps to ensure that the ship will not sail unless and until these requirements are met to the extent that the danger has been removed. The facts concerning the action taken shall be reported promptly to the Secretary-General.

(4) When exercising control under this article, all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is so detained or delayed it shall be entitled to compensation for any loss or damage resulting therefrom.

(5) This article shall be applied as may be necessary to ensure that no more favorable treatment is given to ships entitled to fly the flag of a non-Party than is given to ships entitled to fly the flag of a Party.

3. Table A-II/1, Column 2, of the Seafarers' Training, Certification and Watchkeeping Code (STCW Code) provides, in relevant part:

<u>English language</u>

Adequate knowledge of the English language to enable the officer to use charts and other nautical publications, to understand meteorological information and messages concerning ship's safety and operation, to communicate with other ships and coast stations and to perform the officer's duties also with a multilingual crew, including the ability to use and understand the Standard Marine Navigational Vocabulary as replaced by the IMO Standard Marine Communication Phrases.

4. Section B-VIII/2, Part 5, of the STCW Code provides:

PART 5 - GUIDANCE ON PREVENTION OF DRUG AND ALCOHOL ABUSE*

34 Drug and alcohol abuse directly affect the fitness and ability of a seafarer to perform watchkeeping duties. Seafarers found to be under the influence of drugs or alcohol should not be permitted to perform watchkeeping duties until they are no longer impaired in their ability to perform those duties.

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* See MSC/Circ. 595 - Principles and Guidelines Concerning Drug and Alcohol Abuse Programmes and MSC/Circ. 634 - Drug Use and Alcohol Abuse.

35 Administrations should consider developing national legislation:

.1 prescribing a maximum of 0.08% blood alcohol level (BAC) during watchkeeping duty as a minimum safety standard on their ships; and

.2 prohibiting the consumption of alcohol within 4 hours prior to serving as a member of a watch.

Drug and alcohol abuse screening programme guidelines

36 The Administration should ensure that adequate measures are taken to prevent alcohol and drugs from impairing the ability of watchkeeping personnel, and should establish screening programmes as necessary which:

.1 identify drug and alcohol abuse;

.2 respect the dignity, privacy, confidentiality and fundamental legal rights of the individuals concerned; and

.3 take into account relevant international guidelines.*

* See MSC/Circ. 595 - Principles and Guidelines Concerning Drug and Alcohol Abuse Programmes and MSC/Circ. 634 - Drug Use and Alcohol Abuse.

5. Section A-VIII/1 of the STCW Code provides:

Fitness for duty

1 All persons who are assigned duty as officer in charge of watch or as a rating forming part of a watch shall be provided a minimum of 10 hours of rest in any 24-hour period.

2 The hours of rest may be divided into no more than two periods, one of which shall be at least 6 hours in length.

3 The requirements for rest periods laid down in paragraphs 1 and 2 need not be maintained in the case of an emergency or drill or in other overriding operational conditions.

4 Notwithstanding the provisions of paragraphs 1 and 2, the minimum period of ten hours may be reduced to not less than 6 consecutive hours provided that any such reduction shall not extend beyond two days and not less than 70 hours of rest are provided each seven-day period.

5 Administrations shall require that watch schedules be posted where they are easily accessible.

APPENDIX F

1. Section 3703 of Title 46, United States Code, provides:

§ 3703. Regulations

(a) The Secretary shall prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels to which this chapter applies, that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment. The Secretary may prescribe different regulations applicable to vessels engaged in the domestic trade, and also may prescribe regulations that exceed standards set internationally. Regulations prescribed by the Secretary under this subsection are in addition to regulations prescribed under other laws that may apply to any of those vessels. Regulations prescribed under this subsection shall include requirements about—

(1) superstructures, hulls, cargo holds or tanks, fittings, equipment, appliances, propulsion machinery, auxiliary machinery, and boilers;

(2) the handling or stowage of cargo, the manner of handling or stowage of cargo, and the machinery and appliances used in the handling or stowage;

(3) equipment and appliances for lifesaving, fire protection, and prevention and mitigation of damage to the marine environment;

(4) the manning of vessels and the duties, qualifications, and training of the officers and crew;

(5) improvements in vessel maneuvering and stopping ability and other features that reduce the possibility of marine casualties;

(6) the reduction of cargo loss if a marine casualty occurs; and

(7) the reduction or elimination of discharges during ballasting, deballasting, tank cleaning, cargo handling, or other such activity.

(b) In prescribing regulations under subsection (a) of this section, the Secretary shall consider the types and grades of cargo permitted to be on board a tank vessel.

(c) In prescribing regulations under subsection (a) of this section, the Secretary shall establish procedures for consulting with, and receiving and considering the views of—

(1) interested departments, agencies, and instrumentalities of the United States Government;

(2) officials of State and local governments;

(3) representatives of port and harbor authorities and associations;

(4) representatives of environmental groups; and

(5) other interested parties knowledgeable or experienced in dealing with problems involving vessel safety, port and waterways safety, and protection of the marine environment.

2. Section 1018(a) of the Oil Pollution Act of 1990 (OPA), Pub. L. No. 101-380, 104 Stat. 505 (codified at 33 U.S.C. 2718(a)) provides, in relevant part:

Nothing in this Act * * * shall * * * affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—(A) the discharge of oil or other pollution by oil within such State; or (B) any removal activities in connection with such a discharge.

3. Section 1018(c) of the OPA, 104 Stat. 506 (codified at 33 U.S.C. 2718(c)) provides, in relevant part:

Nothing in this Act * * * shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof— (1) to impose additional liability or additional requirements; or (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge, or substantial threat of a discharge, of oil.

APPENDIX G

1. Section 95.035 of Title 33 of the Code of Federal Regulations provides:

§ 95.035 Reasonable cause for directing a chemical test.

(a) Only a law enforcement officer or a marine employer may direct an individual operating a vessel to undergo a chemical test when reasonable cause exists. Reasonable cause exists when:

(1) The individual was directly involved in the occurrence of a marine casualty as defined in Chapter 61 of Title 46, United States Code, or

(2) The individual is suspected of being in violation of the standards in §§ 95.020 or 95.025.

(b) When an individual is directed to undergo a chemical test, the individual to be tested must be informed of that fact and directed to undergo a test as soon as is practicable.

(c) When practicable, a marine employer should base a determination of the existence of reasonable cause, under paragraph (a)(2) of this section, on observation by two persons.

2. Section 155.700 of Title 33 of the Code of Federal Regulations provides:

§ 155.700 Designation of person in charge.

Each operator or agent of a vessel with a capacity of 250 or more barrels of fuel oil, cargo oil, hazardous material, or liquefied gas as regulated in Table 4 of 46

CFR part 154, or each person who arranges for and hires a person to be in charge of a transfer of fuel oil, of a transfer of liquid cargo in bulk, or of cargo-tank cleaning, shall designate, either by name or by position in the crew, the person in charge (PIC) of each transfer to or from the vessel and of each tank-cleaning.

3. Section 164.13(c) of Title 33 of the Code of Federal Regulations provides:

§ 164.13 Navigation underway: tankers.

* * * * *

(c) Each tanker must navigate with at least two licensed deck officers on watch on the bridge, one of whom may be a pilot. In waters where a pilot is required, the second officer, must be an individual licensed and assigned to the vessel as master, mate, or officer in charge of a navigational watch, who is separate and distinct from the pilot.

4. Section 4.05-12 of Title 46 of the Code of Federal Regulations provides:

§ 4.05-12 Alcohol or drug use by individuals directly involved in casualties.

(a) For each marine casualty required to be reported by § 4.05-10, the marine employer shall determine whether there is any evidence of alcohol or drug use by individuals directly involved in the casualty.

(b) The marine employer shall include in the written report, Form CG-2692, submitted for the casualty information which:

(1) Identifies those individuals for whom evidence of drug or alcohol use, or evidence of intoxication, has been obtained; and,

(2) Specifies the method used to obtain such evidence, such as personal observation of the individual, or by chemical testing of the individual.

(c) An entry shall be made in the official log book, if carried, pertaining to those individuals for whom evidence of intoxication is obtained. The individual must be informed of this entry and the entry must be witnessed by a second person.

(d) If an individual directly involved in a casualty refuses to submit to, or cooperate in, the administration of a timely chemical test, when directed by a law enforcement officer or by the marine employer, this fact shall be noted in the official log book, if carried, and in the written report (Form CG-2692), and shall be admissible as evidence in any administrative proceeding.

5. Subpart 4.06 of Title 46 of the Code of Federal Regulations provides:

SUBPART 4.06—MANDATORY CHEMICAL TESTING FOLLOWING SERIOUS MARINE INCIDENTS INVOLVING VESSELS IN COMMERCIAL SERVICE

§ 4.06-1 Responsibilities of the marine employer.

(a) At the time of occurrence of a marine casualty, a discharge of oil into the navigable waters of the United States, a discharge of a hazardous substance into the navigable waters of the United States, or a release of a hazardous substance into the environment of the United States, the marine employer shall make a timely, good faith determination as to whether the

occurrence currently is, or is likely to become, a serious marine incident.

(b) When a marine employer determines that a casualty or incident is, or is likely to become, a serious marine incident, the marine employer shall take all practicable steps to have each individual engaged or employed on board the vessel who is directly involved in the incident chemically tested for evidence of drug and alcohol use.

(c) The determination of which individuals are directly involved in a serious marine incident is to be made by the marine employer. A law enforcement officer may determine that additional individuals are directly involved in the serious marine incident. In such cases, the marine employer shall take all practicable steps to have these individuals tested in accordance with paragraph (b) of this section.

(d) The requirements of this subpart shall not prevent vessel personnel who are required to be tested from performing duties in the aftermath of a serious marine incident when their performance is necessary for the preservation of life or property or the protection of the environment.

(e) The marine employer shall ensure that all individuals engaged or employed on board a vessel are fully indoctrinated in the requirements of this subpart, and that appropriate vessel personnel are trained as necessary in the practical applications of these requirements.

(f) Each marine employer shall implement the testing requirements of this subpart in accordance with

the implementation schedule provided in 46 CFR 16.205 and 16.207.

§ 4.06-5 Responsibilities of individuals directly involved in serious marine incidents.

(a) Any individual engaged or employed on board a vessel who is determined to be directly involved in a serious marine incident shall provide blood, breath or urine specimens for chemical tests required by § 4.06-10 when directed to do so by the marine employer or a law enforcement officer.

(b) If the individual refuses to provide blood, breath or urine specimens, this refusal shall be noted on Form CG-2692B and in the vessel's official log book, if one is required.

(c) No individual may be forcibly compelled to provide specimens for chemical tests required by this part; however, refusal is considered a violation of regulation and could subject the individual to suspension and revocation proceedings under Part 5 of this chapter and removal from any duties which directly affect the safety of the vessel's navigation or operations.

§ 4.06-10 Required specimens.

Each individual required to submit to chemical testing shall, as soon as practicable, provide the following specimens for chemical testing:

(a) Urine specimens, collected in accordance with § 4.06-20 and Part 16 of this Chapter.

(b) Blood or breath specimens, or both, collected in accordance with § 4.06- 20.

§ 4.06-20 Specimen collection requirements.

(a) All inspected vessels certificated for unrestricted ocean routes, and all inspected vessels certificated for restricted overseas routes, are required to have on board at all times a breath testing device capable of determining the presence of alcohol in a person's system. The breath testing device shall be used in accordance with procedures specified by the manufacturer.

(b) The marine employer shall ensure that urine specimen collection and shipping kits meeting the requirements of § 16.330 of this part are readily available for use following serious marine incidents. The specimen collection and shipping kits need not be maintained aboard each vessel if they can otherwise be readily obtained within 24 hours from the time of the occurrence of the serious marine incident.

(c) The marine employer shall ensure that specimens required by § 4.06-10 are collected as soon as practicable following the occurrence of a serious marine incident.

(d) When obtaining blood, breath, and urine specimens, the marine employer shall ensure that the collection process is supervised by either qualified collection personnel, the marine employer, a law enforcement officer, or the marine employer's representative.

(e) Chemical tests of an individual's breath for the presence of alcohol using a breath testing device may be conducted by any individual trained to conduct such tests. Blood specimens shall be taken only by qualified medical personnel.

§ 4.06-30 Specimen collection in incidents involving fatalities.

(a) When an individual engaged or employed on board a vessel dies as a result of a serious marine incident, blood and urine specimens must be obtained from the remains of the individual for chemical testing, if practicable to do so. The marine employer shall notify the appropriate local authority, such as the coroner or medical examiner, as soon as possible, of the fatality and of the requirements of this subpart. The marine employer shall provide the specimen collection and shipping kit and request that the local authority assist in obtaining the necessary specimens. When the custodian of the remains is a person other than the local authority, the marine employer shall request the custodian to cooperate in obtaining the specimens required under this part.

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary specimens, the marine employer shall provide an explanation of the circumstances on Form CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident).

§ 4.06-40 Specimen handling and shipping.

(a) The marine employer shall ensure that blood specimens collected in accordance with §§ 4.06-20 and

4.06-30 are promptly shipped to a testing laboratory qualified to conduct tests on such specimens. A proper chain of custody must be maintained for each specimen from the time of collection through the authorized disposition of the specimen. Blood specimens must be shipped to the laboratory in a cooled condition by any means adequate to ensure delivery within twenty-four (24) hours of receipt by the carrier.

(b) The marine employer shall ensure that the urine specimen collection procedures of § 16.310 of this part and the chain of custody requirements of § 16.320 are complied with. The marine employer shall ensure that urine specimens required by §§ 4.06-20 and 4. 06-30 are promptly shipped to a laboratory complying with the requirements of 49 CFR Part 40. Urine specimens must be shipped by an expeditious means, but need not be shipped in a cooled condition for overnight delivery.

§ 4.06-50 Specimen analysis and follow-up procedures.

(a) Each laboratory will provide prompt analysis of specimens collected under this subpart, consistent with the need to develop all relevant information and to produce a complete analysis report.

(b) Reports shall be sent to the Medical Review Officer meeting the requirements of 49 CFR 40.33, as designated by the marine employer submitting the specimen for testing. Wherever a urinalysis report indicates the presence of a dangerous drug or drug metabolite, the Medical Review Officer shall review the report as required by 49 CFR 40.33 and submit his or her findings to the marine employer. Blood test reports indicating the presence of alcohol shall be similarly

reviewed to determine if there is a legitimate medical explanation.

(c) Analysis results which indicate the presence of alcohol, dangerous drugs, or drug metabolites shall not be construed by themselves as constituting a finding that use of drugs or alcohol was the probable cause of a serious marine incident.

§ 4.06-60 Submission of reports and test results.

(a) Whenever an individual engaged or employed on a vessel is identified as being directly involved in a serious marine incident, the marine employer shall complete Form CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident).

(b) When the serious marine incident requires the submission of Form CG-2692 (Report of Marine Casualty, Injury or Death) to the Coast Guard in accordance with § 4.05-10, the report required by paragraph (a) of this section shall be appended to Form CG-2692.

(c) In incidents involving discharges of oil or hazardous substances as described in § 4.03-2 (b) and (c) of this part, when Form CG-2692 is not required to be submitted, the report required by paragraph (a) of this section shall be submitted to the Coast Guard Officer in Charge, Marine Inspection, having jurisdiction over the location where the discharge occurred or nearest the port of first arrival following the discharge.

(d) Upon receipt of the report of chemical test results, the marine employer shall submit a copy of the test results for each person listed on the CG-2692B to

the Coast Guard Officer in Charge, Marine Inspection to whom the CG-2692B was submitted.

[CGD 86-067, 53 FR 47078, Nov. 21, 1988, as amended by CGD 97-057, 62 FR 51041, Sept. 30, 1997]

6. Section 16.230 of Title 46 of the Code of Federal Regulations provides:

§ 16.230 Random testing requirements.

(a) Marine employers shall establish programs for the chemical testing for dangerous drugs on a random basis of crewmembers on inspected vessels who:

(1) Occupy a position, or perform the duties and functions of a position, required by the vessel's Certificate of Inspection;

(2) Perform the duties and functions of patrolmen or watchmen required by this chapter; or,

(3) Are specifically assigned the duties of warning, mustering, assembling, assisting, or controlling the movement of passengers during emergencies.

(b) Marine employers shall establish programs for the chemical testing for dangerous drugs on a random basis of crewmembers on uninspected vessels who:

(1) Are required by law or regulation to hold a license issued by the Coast Guard in order to perform their duties on the vessel;

(2) Perform duties and functions directly related to the safe operation of the vessel;

(3) Perform the duties and functions of patrolmen or watchmen required by this chapter; or,

(4) Are specifically assigned the duties of warning, mustering, assembling, assisting, or controlling the movement of passengers during emergencies.

(c) The selection of crewmembers for random drug testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with crewmembers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the testing frequency and selection process used, each covered crewmember shall have an equal chance of being tested each time selections are made and an employee's chance of selection shall continue to exist throughout his or her employment. As an alternative, random selection may be accomplished by periodically selecting one or more vessels and testing all crewmembers covered by this section, provided that each vessel subject to the marine employer's test program remains equally subject to selection.

(d) Marine employers may form or otherwise use sponsoring organizations, or may use contractors, to conduct the random chemical testing programs required by this part.

(e) Except as provided in paragraph (f) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered crewmembers.

(f) The annual rate for random drug testing may be adjusted in accordance with this paragraph.

(1) The Commandant's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported random positive rate for the entire industry. All information used for this determination is drawn from the drug MIS reports required by this part. In order to ensure reliability of the data, the Commandant considers the quality and completeness of the reported data, may obtain additional information or reports from marine employers, and may make appropriate modifications in calculating the industry random positive rate. Each year, the Commandant will publish in the Federal Register the minimum annual percentage rate for random drug testing of covered crewmembers. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

(2) When the minimum annual percentage rate for random drug testing is 50 percent, the Commandant may lower this rate to 25 percent of all covered crewmembers if the Commandant determines that the data received under the reporting requirements of 46 CFR 16.500 for two consecutive calendar years indicate that the positive rate is less than 1.0 percent.

(3) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of 46 CFR 16.500 for any calendar year indicate that the positive rate is equal to or greater than 1.0 percent, the Commandant will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered crewmembers.

(g) Marine employers shall randomly select a sufficient number of covered crewmembers for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random drug testing determined by the Commandant. If the marine employer conducts random drug testing through a consortium, the number of crewmembers to be tested may be calculated for each individual marine employer or may be based on the total number of covered crewmembers covered by the consortium who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT drug testing rule.

(h) Each marine employer shall ensure that random drug tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(i) If a given covered crewmember is subject to random drug testing under the drug testing rules of more than one DOT agency for the same marine employer, the crewmember shall be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the crewmember's function.

(j) If a marine employer is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the marine employer may—

(1) Establish separate pools for random selection, with each pool containing the covered crewmembers who are subject to testing at the same required rate; or

(2) Randomly select such crewmembers for testing at the highest percentage rate established for the calendar year by any DOT agency to which the marine employer is subject.

(k) An individual may not be engaged or employed, including self-employment, on a vessel in a position as master, operator, or person in charge for which a license or merchant mariner's document is required by law or regulation unless all crewmembers covered by this section are subject to the random testing requirements of this section.

7. Section 16.240 of Title 46 of the Code of Federal Regulations provides:

§ 16.240 Serious marine incident testing requirements.

The marine employer shall ensure that all persons directly involved in a serious marine incident are chemically tested for evidence of dangerous drugs and alcohol in accordance with the requirements of 46 CFR 4.06.

APPENDIX H

1. Section 317-21-200(a) of the Washington Administrative Code provides:

317-21-200. Operating procedures—Watch practices.

* * * * *

(a) When the tanker is operating in restricted visibility, the navigation watch shall include at least three licensed deck officers, one of whom may be a state-licensed pilot when the tanker is in pilotage waters. The vessel master or officer in charge shall determine periods of restricted visibility and record in the deck log the time restricted visibility begins and ends.

* * * * *

2. Section 317-21-230 of the Washington Administrative Code provides:

317-21-230. Personnel policies—Training.

An oil spill prevention plan for a tanker must describe a comprehensive training program that requires training beyond the training necessary to obtain a license or merchant marine document. The program must include instruction on the use of job-specific equipment, installed technology, lifesaving equipment and procedures, and oil spill prevention and response equipment and procedures. The program must at a minimum contain the following elements.

(1) Crew training. Within three years from the effective date of this chapter or from the date of employment by the owner or operator, whichever is

later, a crew member shall complete a comprehensive training program approved by the office.

(2) Vessel orientation. Personnel newly assigned to a tanker or who have not served on another tanker of the same vessel type for more than one year, and maintenance personnel who sail on tankers, shall undergo an orientation that includes:

(a) Station assignments and procedures under WAC 317-21-220; and

(b) A vessel familiarization tour that includes:

(i) A walking tour of the deck house and other spaces designated by the vessel master; and

(ii) Identification of all egress routes.

(3) Position specific requirements. All personnel newly hired or who have not served on a tanker of the same vessel type for more than one year, and who are filling positions designated on the vessel's certificate of inspection issued by the U.S. Coast Guard or safe manning certificate issued by the vessel's nation of registry, shall complete training specific to their position.

(a) The vessel's master, chief mate, chief engineer, and senior assistant engineer shall be trained in shipboard management.

(b) The vessel's master and other licensed deck officers shall be trained in:

(i) Bridge resource management;

(ii) Automated radar plotting aids;

(iii) Shiphandling;

(iv) Crude oil washing, if the vessel is so equipped;

(v) Inert gas systems, if the vessel is so equipped;

(vi) Cargo handling for all cargo types carried, including associated hazards with each type, and hull stress during cargo transfer;

(vii) Oil spill prevention and response responsibilities; and

(viii) Shipboard fire fighting.

(c) The vessel's licensed engineering officers shall be trained in:

(i) Inert gas systems, if the vessel is so equipped;

(ii) Vapor recovery systems, if the vessel is so equipped;

(iii) Crude oil washing, if the vessel is so equipped;

(iv) Oil spill prevention and response responsibilities; and

(v) Shipboard fire fighting.

(d) Unlicensed ratings shall be trained in bridge resource management if assigned bridge responsibilities, or in cargo handling if assigned cargo handling responsibilities, or both, and all ratings shall receive training in oil spill prevention and response, and shipboard fire fighting.

(4) Refresher training. Personnel who received training described in subsection (3) of this section shall

undergo refresher training at least once every five years. Refresher training must include examination of the crew member's skills to determine his or her ability to safely and effectively perform in the position assigned. Personnel who fail to undergo refresher training within five years, shall complete the position specific training program required in subsection (3) of this section.

(5) Shipboard drills. The following shipboard drills must be conducted and logged in the vessel's deck log.

(a) A weekly fire drill that meets the requirements of 46 C.F.R. sec. 35.10-5.

(b) A monthly abandon ship drill that meets the requirements of the International Convention on Safety of Life at Sea, Chapter III, Part B, Regulation 18.

(c) The following drills must be conducted quarterly:

(i) Oil spill response;

(ii) Emergency steering that complies with the International Convention of Safety of Life at Sea, Chapter V, Regulation 19-2(d);

(iii) Loss of propulsion;

(iv) Loss of electrical power;

(v) Emergency towing; and

(vi) Man overboard.

3. Section 317-21-235(6) of the Washington Administrative Code provides:

317-21-235. Personnel policies—Illicit drug and alcohol use.

* * * * *

(6) The owner or operator shall report to the office the name, rating and assigned vessel of any navigation or engineering watchstander who remains employed by the owner or operator as a watchstander after testing positive more than once during the previous twelve months of employment for illicit drugs or use of alcohol on a tanker. The report shall be made within seventy-two hours of confirmation of the positive test result.

* * * * *

4. Section 317-21-250(1) of the Washington Administrative Code provides:

317-21-250. Personnel policies—Language.

An oil spill prevention plan for a tanker must demonstrate that:

(1) All licensed deck officers and the vessel's designated person in charge under 33 CFR sec. 155.700 are proficient in English and speak a language understood and spoken by subordinate officers and unlicensed crew;

* * * * *

Supreme Court, U.S.
FILED
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Nos. 98-1701, 98-1706

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

-and-

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

v.

GARY LOCKE, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County; K. CARL LONG, Prosecutor of Skagit County; JAMES H. KRIDER, Prosecutor of Snohomish County; NORMAN MALENG, Prosecutor of King County; NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL and OCEAN ADVOCATES,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT-INTERVENORS

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STATEMENT OF THE CASE

Respondent-Intervenors request the Court to deny the two pending Petitions for Writ of Certiorari submitted by Petitioners Intertanko and the United States of America, Docket Nos. 98-1706 and 98-1701, respectively. Both Petitioners seek an order declaring that Washington State statutes pertaining to the operation of oil tankers in state waters and the state Best Achievable Protection Regulations (BAP) are unconstitutional. The Ninth Circuit correctly concluded that the regulations at issue are reasonable, non-discriminatory environmental protection measures under the state's inherent police powers. *Intertanko v. Locke*, 148 F.3d 1053, 1061 (9th Cir. 1998) ("*Intertanko II*").

A. Background.

On July 17, 1995 the International Association of Independent Tanker Owners (Intertanko) brought this suit for declaratory and injunctive relief against Washington state and local officials responsible for enforcing the BAP regulations. Shortly after the suit was filed, the Washington Environmental Council, Natural Resources Defense Council and Ocean Advocates intervened. On February 29, 1996, Intertanko requested that the United States intervene in support of their position that the BAP regulations was preempted by federal law. Letter from C. Jonathan Benner to RADM James C. Card, U.S. Coast Guard, dated February 29, 1996. The United States declined and played no part in the District Court proceedings.

On cross motions for summary judgment, the District Court ruled that the BAPs were not preempted by either federal or international law. The Court further ruled that the BAPs were specifically authorized by the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990) ("OPA 90"), and that the Coast Guard regulations which attempted to preempt them were beyond the scope of their statutory authority. *Intertanko v. Lowry*, 947 F. Supp. 1484 (W.D. Wash. 1996) ("*Intertanko I*"). The Court's judgment was entered on November 20, 1996. Intertanko filed a timely Notice of Appeal on December 11, 1996. On April

23, 1997, five calendar days before Intertanko's brief was originally due, the United States filed a Motion to Intervene. In the alternative, the United States indicated that it would file an amicus brief for which no leave of court was required. This motion was granted over Intervenor's objections that the motion was untimely.

The Ninth Circuit reversed the District Court's holding that specific Washington regulations which address the design and construction of an oil tanker are not preempted by federal law. *Intertanko II*, at 1066-67. However, the Court affirmed the District Court's judgment as to all other challenged BAP regulations. *Id.*, at 1069. The Ninth Circuit decision does not conflict with any other circuit. As explained below, its decision is entirely consistent with federal law.

B. The Oil Pollution Act of 1990, Section 1018.

Contrary to expressing its "clear and manifest" purpose to supersede the state's historic police powers, the clear language of OPA '90 provides for a savings clause or express non-preemption. In matters of statutory construction, it is appropriate to begin with the language of the statute itself. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, 96 S. Ct. 1989, 1993, 48 L. Ed. 2d 540 (1976); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979). "[W]hen a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, 112 S. Ct. 2589, 120 L. Ed. 2d 379 (1992). The relevant statutory language appears as follows:

> (a) PRESERVATION OF STATE AUTHORITIES; . . . — **Nothing in this Act** or the Act of March 3, 1851, **shall** —
>
> (1) **affect, or be construed or interpreted as preempting**, the authority of any State or political subdivision thereof from imposing **any additional liability or requirements with respect to** —
>
> (A) **the discharge of oil** or other pollution by oil within such State; or
>
> (B) any removal activities in connection with such discharge;
>
> * * *
>
> (c) ADDITIONAL REQUIREMENTS AND LIABILITIES . . . — **Nothing in this Act**, the Act of March 3, 1851, or section 9509 of the Internal Revenue Code of 1986 . . . **shall in any way affect, or be construed to affect**, the authority of the United States or any State or political subdivision thereof —
>
> (1) to impose additional liability or **additional requirements**;
>
> * * *
>
> . . . **relating to the discharge, or substantial threat of discharge, of oil**.

OPA § 1018 (emphasis added). All parties agree that § 1018(a) grants to the states ample authority to impose their own standards of liability which differ from federal or international standards. Intertanko at 24-25, U.S. at 22. No additional statutory language is necessary to achieve this result.

It is clear that subsection (c) expanded the permissible scope of state action from that already provided in subsection (a), otherwise it would be merely superfluous. The authorization to impose additional requirements relating to a substantial threat of discharge is express authorization to the states to enact rules and regulations to prevent oil spills. The statutory inclusion of the word "prevention" is not an indispensable prerequisite to this authorization. The Plaintiff's interpretation of § 1018 would render subsection (c) superfluous and meaningless. Elementary cannons of statutory construction, however, foreclose that result. It is the " 'cardinal principle of statutory construction' . . . [that] [i]t is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section." *Bennett v. Spear*, 520 U.S. 154, 173, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). "[C]ourts should disfavor interpretations of statutes that render language superfluous." *Connecticut Nat.*

Bank v. Germain, 503 U.S. 249, 253, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992).

C. There exists a strong presumption against preemption. The historic police powers are not to be superseded absent a clear expression of Congressional purpose.

Although not acknowledged by Petitioners, there exists a strong presumption against preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 515-16, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992). In evaluating a federal law's preemptive effect, courts proceed from the presumption that the historic police powers of the state are not to be superseded by a federal act **"unless that [is] the clear and manifest purpose of Congress."** *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947) (emphasis added). Quite simply, Congress has not clearly manifested its purpose to preempt efforts by the states to prevent oil spills. Just to the contrary, OPA 90 specifically authorizes the states to regulate to prevent oil spills.

The right of Washington to enact oil spill regulations concurrent and complementary with the federal government is critical to a balance of federalism necessary to allow individual states the autonomy envisioned by the Tenth Amendment. The genius of federalism within the environmental context has been eloquently expressed by the Ninth Circuit as follows:

> Within our federal system, states are intended to be laboratories of experimentation in which various policies are debated, implemented and refined. The modern environmental movement started in the states. The federal government has followed the lead of the states, evaluating different state programs and borrowing the best ideas in order to form a comprehensive federal law. It is incongruous that in adopting the ideas that states have already developed, federal law should prevent further innovation by prohibiting states from expanding their environmental programs, be they regulation of

> hazardous materials transportation or other initiatives. By preempting state authority in this case, we effectively eliminate the ability of states to develop new and better ways of protecting the public health, safety and environment. And, we prevent innovative state programs from percolating up to the federal level.

The Chlorine Institute, Inc. v. California Highway Patrol, 29 F.3d 495, 499 (9th Cir. 1994).

D. International law does not preclude the right of Washington to enact reasonable, non-discriminatory environmental protection measures.

1. The treaty provisions relied upon by Petitioners are all non-self-executing.

Petitioners grossly distort the interplay between international and federal law. Petitioners summarily conclude that when the Federal Government accedes to an international treaty, that treaty automatically becomes the law of the land, thereby preempting any state action. Intertanko at 8. This novel assertion is contrary to a century of Supreme Court precedent. None of the applicable treaty provisions in the case at bar are self-executing, a necessity for the Supremacy Clause argument. *Restatement (Third) of Foreign Relations Law of the United States* ("*Restatement*"), § 131 (1987).[1]

1. The applicable treaties include the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, as amended, London, July 7, 1978 (T.I.A.S.) ("STCW"), S. Treaty Doc. No. 96-1, C.T.I.A. No. 7624, the International Convention for the Prevention of Pollution from Ships, London, 1973, 12 I.L.M. 1319, and the Protocols of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, London 1978, 17 I.L.M. 546, as amended, with annexes (MARPOL 73/78), the Convention on International Regulations for Preventing Collisions at Sea, as amended (COLREG), London, October 20, 1972, 28 U.S.T. 3459, T.I.A.S. No. 8587, and the International Convention for the Safety of Life at Sea, as amended, with annexes and Protocol of 1978 (SOLAS) (16 UST 185, T.I.A.S. 5780; 32 UST 47, T.I.A.S. No. 9700; 32 UST 5577, T.I.A.S. 10009).

International vessel standards are unilaterally implemented on the domestic level by each signatory nation. None of the treaties "set" staffing, personnel training, qualifications, or oil tanker operations as asserted by Petitioners. *See, e.g.*, U.S. at 11. These treaties enunciate vague, minimal standards which cannot logically or legally rise to the level of the supreme law of the land; when treaty provisions before a Court are phrased in broad generalities, they cannot be self-executing. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985). A non-self-executing treaty provision does not afford rights which a court may apply to establish preemption. There are at least four relevant factors to be considered when determining whether a treaty is self-executing.

> (1) the purposes of the treaty and the objectives of its creators, (2) the existence of domestic procedures and institutions appropriate for direct implementation, (3) the availability and feasibility of alternative enforcement mechanisms, and (4) the immediate and long-range social consequences of self- or non-self-execution.

People of Saipan v. United States Department of Interior, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975). Throughout the history of this litigation, neither Petitioner has been able to provide any evidence that the treaties before the Court are of a self-executing character. *Intertanko I*, at 1490, n.3.

The United States decrees that the BAPs undermine the ability of the United States to conform to the international vessel management regime. There is an inherent flaw in this analysis: there is no corresponding international regime. For example, the STCW does not "prescribe" any training standards for signatory nations. The standards within STCW only provide instruction that a signatory nation should implement *some* form of training; as the Coast Guard recently confirmed, "[t]he [training] requirements of STCW must be implemented by each vessel's flag state." 61 FR 39775 (1996). These provisions

cannot constitutionally reign as the supreme law of the land without domestic implementation. *Restatement* § 131. Upon implementation, federal law, not the treaty, becomes the appropriate mechanism for preemption analysis. *Id.*

2. Uniformity and reciprocity in vessel standards do not exist.

Petitioners allege that the international scheme of oil shipping is guided by abstractions of reciprocity and uniformity. U.S. at 3. The inherent flaw within Petitioners' arguments of international uniformity and reciprocity lies in the non-self-executing character of the treaties at issue. Reciprocity and uniformity are amorphous international goals and do not exist in any recognizable order, and certainly not in practice. International vessel standards are all subjectively interpreted by each signatory nation. "[I]n a science as inexact as the interpretation of agreements, differences will inevitably emerge. To some extent these are due to differences in the approaches to interpretation of different legal systems." *Restatement*, § 325, Reporters' Note (4)(1987).

Individual flag-states unilaterally implement the treaties to suit their own interests, no nation can be "assured" that a vessel flagged by a signatory nation and entering local waters is in compliance with even a minimum international floor; these treaties set forth the least common denominator in vessel safety. *See generally* Donaldson, L., *Safer Ships, Cleaner Seas; Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping*. Supp. Excerpts at 1066.[2]

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2. The United States portrays the STCW as an international regime which establishes uniform international training standards. U.S. at 2. Even the Coast Guard recognizes this argument as meritless; the STCW is non-self-executing and ineffective to advance the interests of vessel safety: "[STCW] requirements . . . [are] too vague and [leave] too much to the discretion of Parties; [STCW displays] the absence of clear, uniform standards of competence; ineffective international [enforcement]; limited provisions for port state control; and outdated technical references." 61 FR 13284 (1996).

3. Federal vessel standards do not uniformly implement international standards.

Petitioners expose inherent contradictions in their uniformity arguments by alleging that OPA 90 was designed, in part, with the purpose of "creating" uniform non-preemption of state liability regimes. Intertanko at 5. OPA 90 did not "create" uniform federal law with respect to state liability regimes. The pre-OPA federal liability scheme already authorized unilateral state liability schemes, although not generally unlimited liability. *See* Intertanko at 5-6. A primary purpose of § 1018(a) was to authorize **non-uniform** liability regimes, with the opportunity for unlimited state liability. This was accomplished by OPA through the unequivocal U.S. abdication of international liability regimes.[3] U.S. accession to the international regimes would: (1) produce a cap on vessel spill liability and; (2) prevent the states from imposing their own liability regimes. *See* Mitchell, G., Sen. *Preservation of State and Federal Authority Under the Oil Pollution Act of 1990*, 21 Env'l L. 237 (1991). This was an option Congress refused to accept; "[t]he Senate voted unanimously to set much tougher federal liability standards than those established by the [international regimes], and to preserve the ability of states to retain and enact more stringent laws." Mitchell, at 250.

The United States argues that the Ninth Circuit placed undue reliance upon OPA § 4115 (requiring double hulls) to determine that uniformity is not Congress' fundamental purpose in oil tanker regulation. U.S. at 10-11. Contrary to this assertion, the lower Court had evidence of multifarious federal oil tanker regulations which are non-uniform and non-reciprocal on both the domestic and international level. *See Intertanko I*, at 1496-97. The lower Court Record is complete with these comparisons by Intertanko, the State, and Intervenors. *See, e.g., Intervenor's Response to Summary Judgment*, 26-40. The fictional nature of

3. Civil Liability Convention, 973 U.N.T.S. 3, 9 I.L.M. 45, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1110 U.N.T.S. 57, 11 I.L.M. 284.

uniformity and reciprocity in oil tanker standards is self-evident within federal regulations purporting to implement international provisions.

The United States argues, in part, that Title 46 U.S.C. Chapter 37 requires the Secretary to accept foreign vessel certificates of compliance, thereby implementing the international regime. U.S. at 5. Petitioner ignores the discretionary nature of the provision. Chapter 37 "requires" that "the Secretary **may** issue [a] certificate only after the vessel has been examined and found to be in compliance with this chapter . . ." 46 U.S.C. § 3711 (emphasis added). "This means that the Secretary **does not have to accept** foreign certificates of compliance." *Id.*, Historical and Revision Notes (emphasis added). Because of its discretionary nature, § 3711 does not implement any international provision.

The treaties generally provide that acceptance of foreign certificates of compliance are authorized unless there are "clear grounds [by the port-state] for believing that the condition of the ship . . . does not correspond substantially with the particulars of any of the certificates . . ." SOLAS Reg. 19(b). Each signatory nation unilaterally determines the meaning of "clear grounds" and what "particulars" are required to be followed. Title 46 provides the Secretary with complete discretion, regardless of whether the vessel's flag-state is a party to a particular treaty or not.

E. The police powers reserved to the states by the Tenth Amendment extend beyond state territorial jurisdiction.

Petitioners misconstrue the applicability of the BAPs to vessels transiting off the Washington Pacific Coast. To support the argument of improper extraterritorial jurisdiction, Petitioners suggest that oil tankers off the coast which are not bound for Washington waters are still subject to the BAPs. Intertanko at 11, U.S. at 28, n.15. This assertion is specious. The BAPs only apply to oil tankers that enter state waters. No oil tanker comes within the territorial waters of the United States, let alone the State of Washington, unless it is either: (1) headed for

Washington internal waters (i.e., the Strait of Juan de Fuca or the Columbia River); or (2) headed out of the Strait of Juan de Fuca or the Columbia River (thereby requiring that it had to have entered Washington internal waters).

Intertanko overstates the BAP extraterritorial qualifications; Intertanko argues that all oil tankers must comply with the requirements "in order to qualify for **eventual admission**" into state waters Intertanko at 12 (emphasis added).[4] In practice, Washington simply requires oil tankers which are destined for, or routinely enter, state waters to comply with the regulations. Determining precisely which tankers fall within the scope of Washington's police power is achieved through a reasonable 24-hour notice of entry requirement. *See* WAC 317-21-540.[5]

Oil spills are migratory. Under traditional police power analysis, a state may exercise its police powers outside of its offshore territorial jurisdiction when there is an integral nexus between the state's interest and the activity sought to be regulated. *Skiriotes v. Florida*, 313 U.S. 69, 61 S. Ct. 924, 85 L. Ed. 1193 (1941); *Askew v American Waterways Operators, Inc.*, 411 U.S. 325, 343, 93 S. Ct. 1590, 36 L. Ed. 2d 280 (1973) ("sea-to-shore pollution [has been] historically within the reach of the police power of the States"); *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936)

4. Petitioners ignore state rules for the conditional approval and/or waiver of BAP requirements when compliance would be unduly burdensome to a tanker. *See* WAC 317-21-410 and 317-21-510.

5. The advance notice report complements the voluntary 24-hour advance notice report required for all large commercial vessels before physically entering the state waters. In February 1998, the Canadian Coast Guard issued a VTS Revision detailing a voluntary 24-hour notice of entry for all vessels destined for the Strait of Juan de Fuca. *See* CVTS West Coast Approaches to Juan de Fuca Strait; Revision 2/98. "This one report will satisfy the Canadian VTS Offshore Report, the U.S. Notice of Arrival Report, and the State of Washington Advance Notice of Entry Report." *Id.* The Canadian Coast Guard is encouraging advance report compliance in accord with WAC 317-21-540. Any alleged and undocumented Canadian complaints are rendered suspect when viewed in conjunction with official Canadian actions.

(California law prohibiting certain fish from being caught inside or outside of state waters and brought into the state); *Laker Airways v. Sabena Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984) (regulations governing extraterritorial activities which are designed to prevent impacts within the state are "not an extraterritorial assertion of jurisdiction"). Before oil tankers which are seaward of Washington's territorial domain actually enter the Strait of Juan de Fuca or the Columbia river, the economy and environment of the state remain subject to damage from an offshore oil spill. The BAPs do not affect the legality of international vessel standards, but rather protect state waters and resources.

REASONS FOR DENYING THE WRIT

I. THE BAPS PROMOTE THE PURPOSES AND OBJECTIVES OF CONGRESS.

The fundamental character and purpose of OPA 90 is to prevent oil spills.[6] After the *Exxon Valdez* disaster, Congress recognized that only a broader joint partnership between the federal government and the states could prevent future oil tragedies. Prior to the *Exxon Valdez*, prevention of oil spills was achieved primarily through federal measures within the Ports and Waterways Safety Act, 33 U.S.C. §§ 1221 *et seq.* and the Port and Tanker Safety Act, 33 U.S.C. §§ 1321 *et seq.* (PWSA/PTSA), and Title 46, all of which principally govern tanker design and construction. The PSWA/PTSA and Title 46 did not, and could not, effectively prevent oil spills. In the true spirit of federalism, Congress enacted OPA 90 with the intent of revolutionizing and enhancing these prior Congressional measures expected to prevent oil spills. As reflected by the *Exxon Valdez* spill and Congressional action in OPA 90, those prior measures proved to be a failure.

6. "[A]ny oil spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment. Consequently, *preventing* oil spills is more important than containing and cleaning them up quickly." S. Rep. No. 94, 101st Cong., 2nd Sess. 2 (1989) *reprinted in* 1990 U.S.C.C.A.N. 722, 723 (emphasis added).

The federal statutes and international treaties cited by Petitioners are all fundamentally maritime in character. The standards within these statutes and treaties are designed with the purpose of protecting national and international waterways from oil pollution by addressing exclusively maritime concerns. The prevention of pollution in these regulations is secondary to their primary objective: navigational capabilities and structural controls. Congress left tangible environmental protection requirements to other appropriate mechanisms of control, specifically complementary federal and state oil spill prevention mechanisms. Police power regulations designed to prevent pollution, but which incidently affect operational procedures, pose no "material prejudice to the characteristic features" of maritime law.[7]

A. There is no conflict between the BAPs and international or federal standards.

The operational measures addressed by the BAPs pose no conflict with analogous federal regulations or international standards. WAC 317-21-200(1)(a) perfectly illuminates this conclusion. The United States argues that WAC 317-21-200(1)(a), which provides for watchkeeping practices, displays the international and domestic "inconsistency" of the BAPs. U.S. at 17. The U.S. argument misrepresents the actual language of the federal and international standards. Coast Guard regulations are not precisely defined and there are no defined international standards. More importantly, the federal regulations do not afford protection for unique local conditions.[8]

7. *See American Dredging Co. v. Miller*, 510 U.S. 443, 985, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994), *quoting Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216, 37 S. Ct. 524, 61 L. Ed. 1086 (1917); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 343, 93 S. Ct. 1590 (1973); *see also* Wyatt, M., *Navigating the limits of State Spill Regulations: How Far Can They Go?*, 8 U.S.F. Maritime L.J. 1 (1995).

8. The international watchkeeping "standard" referred to by the United States, and as expressed within STCW, bestows complete discretion for domestic implementation: "[The flag-state] shall require (Cont'd)

II. OPA AMENDS AND/OR IMPLIEDLY REPEALS PREVIOUS FEDERAL STATUTES WHERE THE TWO ACTS ARE IN IRRECONCILABLE CONFLICT.

Central to both the United States' and Intertanko's argument is that Section 1018 addresses only the preemptive effect of "this Act," and not the preemptive effect of predecessor federal statutes. U.S. at 22. According to Petitioners, the provisions of PSWA/PTSA have preemptive effect on state regulations notwithstanding the language of Section 1018. This interpretation, however, would render the savings clause of Section 1018 (even as to liability for an oil spill) completely meaningless insofar as other statutes regulate the same activity. Elementary cannons of statutory construction, however, demand that federal statutes be harmonized to the extent possible. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, 96

(Cont'd)
the master of every ship to ensure that watchkeeping arrangements are **adequate . . . taking into account the prevailing circumstances and conditions**." STCW Ch. VIII, Reg. VIII/2(2) (emphasis added). The United States alleges that the Coast Guard's implementing regulation requires two licensed officers on the bridge in certain waters. U.S. at 17. Petitioner fails to inform the Court that the federal regulation actually states: "Each tanker must navigate with **at least two** licensed deck officers on watch on the bridge, one of whom may be the pilot." 33 C.F.R. § 164.13(c) (emphasis added).

WAC 317-21-200(1)(a) perfectly reveals the local nature of the BAPs: "When the tanker is operating **in restricted visibility**, the navigation watch shall include at least **three** licensed deck officers, one of whom may be a state-licensed pilot . . . The vessel master or officer in charge shall determine periods of restricted visibility." *Id.* (Emphasis added). Not only does this BAP complement the Coast Guard regulation without conflict, it specifically complements the international requirement that the vessel officers shall determine when to entail the requirement, not the state. Rather than "fly additional personnel to the vessel" as the United States asserts, a tanker may effortlessly comply with this unique local regulation without any increase in the number of its crew.

S. Ct. 1989, 48 L. Ed. 2d 540 (1976) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective").

As stated above, it is uncontested that at the very least OPA has reserved to the states the right to enact regulations relevant to liability without preemption. But if the savings clause is limited to "this Act" as suggested by Petitioners, state regulation even as to liability would nevertheless be preempted because other federal statutes and international treaties regulate liability for oil spills.[9]

The only reasonable interpretation, giving effect to the savings clauses of section 1018, is that the provisions of previous statutes which are in conflict with OPA are amended and implicitly repealed.

> [There are] two well-settled categories of repeals by implication — (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

Radzanower v. Touche Ross & Co., 426 U.S. 148, 154, 96 S. Ct. 1989, 48 L. Ed. 2d 540 (1976) (*quoting Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S. Ct. 349, 80 L. Ed. 351 (1936)). In each of the two categories "the

9. A variety of federal statutes (not listed above) regulate the liability of an oil spill. The Trans-Alaska Pipeline Authorization Act (TAPAA) establishes a comprehensive liability scheme applicable to damages resulting from the transportation of Trans-Alaska pipeline oil. 43 U.S.C. § 1653(c). In addition, the Clean Water Act (CWA) is a remedial statute intended to create a comprehensive plan to expedite oil pollution cleanup and allocate and limit liability. 33 U.S.C. § 1321; *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1191 (9th Cir. 1986). Also, international liability regimes establish strict liability, but cap the liability. *See* Mitchell, *supra*.

intention of the legislature to repeal must be clear and manifest." *Id.*[10]

Congress has implicitly repealed other statutes concerning oil spill prevention and liability. In *In re Glacier Bay*, 944 F.2d 577 (9th Cir. 1991), the Court ruled that the Trans-Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. §§ 1651 *et seq.*, impliedly repealed the Limitation Act in reference to the liability for oil spills. The Court specifically reasoned that "[i]t is clear that TAPAA is a comprehensive liability scheme, which includes, as necessary elements, both strict liability and negligence principles." *Id.* at 582. The Court further reasoned that "the comprehensive nature of TAPAA can not be overemphasized." *Id.* at 583. "We can only conclude that TAPAA was designed to supersede any conflicting law; by TAPAA's nature, it was intended to become **the** controlling statute with regard to trans-Alaska oil spills." *Id.* (emphasis original).[11]

Like TAPAA, the comprehensive nature of OPA can not be overemphasized. OPA was intended to become the controlling statute with reference to oil tanker spill prevention and liability. "[w]hat the Nation needs is a package of complementary international, national, and State laws . . . Instead, there is [currently] a fragmented collection of Federal and State laws." OPA 90, Sen. Rept. No. 101-94, 2, July 28, 1989. Section 1018(c) of OPA authorizes the states to "impose any additional liability or additional requirements . . . relating to the discharge,

10. *See Morton v. Mancari*, 417 U.S. 535, 550, 94 S. Ct. 2474, 2482, 41 L. Ed. 2d 290 (1974) (implied repeal where the statutes at issue are irreconcilable); *Gordon v. New York Stock Exchange*, 422 U.S. 659, 682-83, 95 S. Ct. 2598, 2611-12, 45 L. Ed. 2d 463 (1975) (implied repeal where there exists "plain repugnance" between the statutes).

11. Implicit repeal need not be absolute. "[W]hen two statutes are partially in conflict, '[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary.' " *Glacier Bay*, at 582 *quoting Silver v. New York Stock Exchange*, 373 U.S. 341, 357, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963). Although repeals by implication are not favored, they will be found when "the new statute is clearly repugnant, in words or purpose, to the old statute. . . ." *Id.*

or substantial threat of discharge, of oil." OPA is in irreconcilable conflict with PSWA/PTSA and Title 46 insofar as these acts purport to preempt state regulations. OPA saves state regulation from preemption.

III. FEDERAL CASE LAW SUPPORTS THE AUTHORITY OF THE STATES TO ENACT REASONABLE ENVIRONMENTAL REGULATIONS TO PREVENT AN OIL SPILL.

A. *Ray v. Atlantic Richfield* is limited to design and construction and supports the rights of the states to enact reasonable environmental regulations.

In *Ray v. Atlantic Richfield Company*, 435 U.S. 151, 98 S. Ct. 988, 55 L. Ed. 2d 179 (1978) the Court considered a challenge to the Washington Tanker Law, which regulated the "design, size, and movement of oil tankers in Puget Sound. . . ." *Id.* at 993. Allegedly, the Washington law was preempted by the PWSA/PTSA.

The Court in *Ray* began its analysis with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 994. As articulated above, Congress has not expressed a clear and manifest purpose to supersede Washington's historic police powers to enact environmental regulations to prevent an oil spill. Section 1018 of OPA is an expression explicitly to the contrary.

The Court in *Ray* ruled that Congress intended to foreclose state regulation of tanker design and construction. *Id.* at 997. The Court, however, recognized the state's right to enact "reasonable, nondiscriminatory conservation and environmental protection measures. . . ." *Id.* at 997. The Court's ruling in *Ray* was clearly limited to design and construction.

> Of course, that a tanker is certified under federal law as a safe vessel insofar as its design and construction characteristics are concerned does not mean that it is free to ignore otherwise valid

> state or federal rules or regulations that do not constitute design or construction specifications.

Id. at 1000.

Washington's BAP regulations are not concerned with design and construction, and are simply "reasonable, nondiscriminatory conservation and environmental protection measures." As noted above, it is undisputed that compliance with both federal and state regulations is not a physical impossibility. In addition, the BAP regulations do not stand as an obstacle to the full purposes and objectives of Congress; to the contrary they promote the objectives of Congress to prevent oil spills.

B. Federal Courts have consistently limited *Ray* to design and construction.

In *Chevron v. Hammond*, 726 F.2d 483 (9th Cir. 1984), *cert. denied*, 471 U.S. 1140 (1985), the Court addressed whether Alaska's environmental regulations prohibiting the operational discharge of oil in Alaska's water was preempted by Coast Guard regulations. Although the court considered a different statute than now under consideration, the CWA, the Court in *Chevron* ruled on many of the issues now presented to the Court.

Specifically, the Court reviewed a broad spectrum of federal statutes and international conventions which it was claimed occupied the field. The Ninth Circuit concluded otherwise.

> The above authorities demonstrate a congressional intent that there be joint federal/state regulation of ocean waters within three miles of shore. Such joint regulation undermines the argument that Congress in enacting the PWSA/PTSA implicitly intended to occupy the field of regulating tanker pollution in a state's territorial waters.

Id. at 489-490. The Court further recognized "a well-settled congressional policy to promote a state's more stringent regulation of the local marine environment." *Id.* at 491. After reviewing the comprehensive legislative scheme, the Court concluded "that Congress has indicated emphatically that

there is no compelling need for uniformity in the regulation of pollutant discharges — and that there is a positive value in encouraging the development of local pollution control standards stricter than the federal minimums." *Id.* "Here, in fact, the local community is more likely competent than the federal government to tailor environmental regulation to the ecological sensitivities of a particular area." *Id.* at 493.

The argument that the comprehensiveness of the legislative scheme evinces an intent to preempt was rejected. "The complexity and comprehensiveness of federal marine environmental regulation are particularly appropriate without regard to the question of preemption because these regulations must 'be sufficiently comprehensive to authorize and govern programs in States which had no . . . requirements of their own as well as cooperatively in States with such requirements.' " *Id.* at 492.

Contrary to Intertanko's contention, neither *Chevron* nor other federal case law support the proposition that states may only engage in the regulation of "secondary" or "off-the-ship" aspects of maritime activity. Indeed, *Chevron* holds precisely the opposite. *See also Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960) (state regulation of a vessel's on-board operations to prevent air pollution); *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 629 (1st Cir. 1994) ("State regulation of **primary conduct** in the maritime realm is not automatically forbidden. . . .") (emphasis added).

The *Chevron* Court also considered the effect of the local statute on international affairs, and distinguished those valid concerns with tanker design from those relevant to environmental issues.

> Although national uniformity and international consensus are critical concerns in the establishment of tanker design standards, those concerns are not essential in the regulation of pollutant discharges into coastal waters. Once a ship is constructed, it cannot meet new or different design requirements in various ports.

Id. at 493. The overall nature of the environmental regulatory scheme has not changed. Prevention of oil spills and deference to traditional state police powers continues to dominate considerations of illusory uniformity.

In *Chevron*, the Court explicitly limited the holding of *Ray* to "design characteristics", and acknowledged the obligation of tankers to meet otherwise valid state regulations that do not constitute design or construction specifications.

> The Court's finding of preemption is specifically limited to the regulation of vessel "design characteristics" and thus does not control the outcome of the present case involving ocean pollutant discharges. As a matter of fact, the court specifically explained that tankers must meet "otherwise valid state or federal rules or regulations that do not constitute design or construction specifications." 435 U.S. at 168-69, 98 S.Ct. at 999-1000.

Id. at 487.[12]

In *Berman Enterprises v. Jorling*, 793 F. Supp. 408 (E.D.N.Y. 1992) the plaintiffs claimed that the New York Environmental Conservation Law was preempted by operation by the PWSA as amended and subject to Coast Guard regulation. *Id.* at 414. The Plaintiffs in *Berman* also relied upon *Ray* to support its contention of conflict and field preemption. *Id.*

The *Berman* court rejected Plaintiffs' claim of preemption and their reliance on *Ray*. "Contrary to plaintiffs' view, *Ray*

12. Intertanko refers the Court to the dissent by Justice White in the denial of certiorari in *Chevron*. Intertanko at 18, n.19. The remarks by Justice White must be kept in context. His analysis was made long before the Congressional objectives and purposes behind oil spill prevention measures had been fundamentally altered by OPA 90. Justice White's analysis is constrained to the facts and Congressional actions before the Court in 1985 and does not provide a "ripened" opportunity to revisit *Chevron*.

indicates how far the Supreme Court is willing to go to allow local regulation of oil tanker activity." *Id.* at 415 (Citing L. Tribe, *American Constitutional Law*, § 6-28, at 487 (2d ed. 1988)). In response to Plaintiffs' claim of conflict preemption, the Court in *Berman* again relied upon *Ray* and ruled that only an **actual conflict** between state and federal law could result in preemption.

> *Ray*, however, only invalidated state provisions where there was an actual conflict between state and federal law. Where there was no such conflict, the Court steadfastly refused to infer preemption in the field of environmental protection, an area that lies at the core of the states' police powers.

Id. at 415-416. In the case at bar, there is no actual conflict.

The court in *Berman* explicitly recognized that states are authorized to exercise their historic police powers not only after the oil hits the water, but to **prevent** oil spills in the first instance. "*Ray* specifically allowed for statutes that are designed to protect the environment against imminent (or even non-imminent) harms." *Id.* at 417. A more eloquent statement of the necessity for local regulation is hard to imagine.

> Plaintiffs in effect are asking the federal courts to tell New York that it may not, in the exercise of its police powers, plan against the desecration of its waters and coast that would otherwise surely result from the high volume of oil barge traffic on the state's waterways. Plaintiffs would instead have the state rely entirely on distant and overextended officials in Washington, D.C. for basic environmental protections. Such an ineffective scheme is not contemplated by the federal Constitution.

Id. at 416-417.

The court in *Berman* explicitly considers the effect of the non preemption provisions of both the CWA and OPA 90 and acknowledges that if there were otherwise any doubt about

preemption, these acts "settle the issue." *Id.* at 416. After quoting both acts, the Court concluded that "[f]ar from being preempted, [New York] accepts the federal government's invitation to provide additional means of enforcing the federal policy favoring clean water." *Id. See also Ballard Shipping Co. v. Beach Shellfish*, 32 F.2d 623 (1st Cir. 1994) (upholding state law despite the existence of a direct conflict between state law and maritime law).

C. Hypothetical conflicts are insufficient to justify preemption.

Petitioners champion the cry of balkinization in support of an argument that the BAPs threaten the stability of our nation's shipping interests, both domestically and abroad. Intertanko at 18, U.S. at 29. This argument is not only hypothetical, but it ignores the genius of federalism in the environmental context. The right of Washington to enact oil spill regulations to protect its sovereign waters concurrently and complementary with the federal government is critical to a balance of federalism necessary to allow individual states the autonomy envisioned by the Tenth Amendment. The record below is completely devoid of any evidence to suggest that unsafe balkinization is, or will, occur. In "areas of coincident federal and state regulation, the 'teaching of [the] Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.' " *Seagram & Sons v. Hostetter*, 384 U.S. 35, 45, 86 S. Ct. 1254, 16 L. Ed. 2d 336 (1966), *overruled on other grounds*. Congress made a judgment in OPA 90 that prevention of oil spills takes priority over uniformity and reciprocity. Petitioners may not agree with that judgment, but it is not the function of the Petitioners or this Court to second guess the wisdom of Congress.

IV. THE ALLEGED EXPRESS PREEMPTION BY THE U.S. COAST GUARD HAS EXCEEDED THE SCOPE OF ITS ADMINISTRATIVE AUTHORITY.

Intertanko asserts that the Coast Guard has expressly preempted several of the BAP regulations at issue. *See*

Intertanko at 22-24. This argument was specifically rejected by the Ninth Circuit. *Intertanko II*, at 1068. Where statutory language clearly authorizes state regulation without preemptive effect, an agency regulation to the contrary is entitled to no deference. The U.S. Coast Guard has no greater authority than granted under the terms of the statute itself.

> An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.

Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986).[13]

Although deference to administrative agencies in some cases is appropriate, federal courts should not allow deference to "slip into a judicial inertia" and "rubber stamp" administrative determinations. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97, 104 S. Ct. 439, 78 L. Ed. 2d 195 (1983). This deference is especially inappropriate where agency action "is premised on its understanding of a specific Congressional intent . . . [which is] the quintessential judicial function of deciding what a statute means." *Id.* at 98, n.8. *See also Trustees of California State University v. Riley*, 74 F.3d 960, 963 (9th Cir. 1996) ("In reviewing an agency's construction of a statute,

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13. *See also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"); *Medtronic v. Lohr*, 518 U.S. 470, 512, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (O'Connor, J., concurring and dissenting) ("It is not certain that an agency regulation determining the preemptive effect of any federal statute is entitled to deference, [citation omitted] but one pertaining to the clear statute at issue here is surely not. . . . Where the language of the statute is clear, resort to the agency's interpretation is improper").

the court must reject those constructions that are contrary to clear Congressional intent or frustrate the policy that Congress sought to implement").

In the case at bar, Congress has spoken to the precise issue in question. The statute itself and/or the legislative history makes it clear that Congress intended to allow the states to implement protective regulations to prevent oil spills within their jurisdiction. The Coast Guard's determination to the contrary "is premised on its understanding of a specific Congressional intent," and therefore is entitled to little deference. The Coast Guard "may not confer power upon itself." *See Louisiana Pub. Serv. Conn'n v. FCC, supra*. OPA 90's statutory language and the lengthy Congressional history makes clear that Congress intended to allow the states to regulate in the area of oil spill prevention without fear of preemption. The Coast Guard's determination of the preemptive effect of its regulations is simply beyond its authority and has no effect.

A. The Coast Guard's interpretation is entitled to no deference in light of it inconsistent positions.

Even the Coast Guard has explicitly recognized the right of the states to regulate for the prevention of oil spills. In a memorandum dated August 18, 1992 the Coast Guard Commandant, J.W. Kime, states:

> The Oil Pollution Act of 1990 (OPA 90) has been with us for over two years now. The act materially altered the nature of the relationship between the Coast Guard and the states in the marine environmental protection (MEP) arena. **States now have the opportunity for a more active role in pollution prevention, response, access to the Oil Spill liability Trust Fund (the fund), and freedom to regulate in areas historically reserved to federal agencies.**

Supp. Excerpts at 774 (emphasis added). In a memorandum dated May 19, 1993 from A. E. Henn, Chief, Office of Marine

Safety, Security and Environmental Protection, the Coast Guard acknowledged:

> The Oil Pollution Act of 1990 (OPA 90) specifically affirmed the rights of states to protect their marine environment.
>
> . . .
>
> Several states have been extremely pro-active in developing programs that may differ somewhat from our Coast Guard policies and may exceed our mandates and regulations. **OPA 90 did not preempt states rights**, and, in our efforts we must be committed to work together to complement rather than duplicate. Should Federal preemption of a state mandate become necessary, it will become a complex legal issue.

Supp. Excerpts at 687 (emphasis added).

Where a federal agency asserts differing policies on the issue of preemption, any deference to which they might otherwise be entitled evaporates. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447, n.30, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency held view"); *Watt v. Alaska*, 451 U.S. 259, 273, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981) ("The Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference"); *General Electric Co. v. Gilbert*, 429 U.S. 125, 143, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976) ("We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency").

V. THE DOCTRINE OF INNOCENT PASSAGE AND THE U.S./CANADIAN VESSEL TRAFFIC AGREEMENT WERE NOT PRESERVED FOR APPEAL.

The United States may mislead the Court by raising the doctrine of innocent passage and the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (VTS Agreement), 32 U.S.T. 377. U.S. at 27, n.14, 28, n.15. These issues were never preserved for appeal before the District Court. *Intertanko II*, at 1063-64. Generally, a reviewing court has no authority to consider an issue not raised in the trial court. *Vargas v. United States Dep't of Immigration & Naturalization*, 831 F.2d 906, 907 (9th Cir. 1987); *Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir. 1990) (appellant must have adequately preserved issue at summary judgment before it can be considered on appeal).

There are three general exceptions to the rule on appeal preservation: 1) in the "exceptional" case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, 2) when a new issue arises while appeal is pending because of a change in the law, or when the issue presented is purely one of law and either does not depend on the factual record developed below, or 3) the pertinent record has been fully developed. *Bolker v. Commissioner of Revenue*, 760 F.2d 1039, 1042 (9th Cir. 1985). None of the three exceptions apply to the case at bar. An issue has not changed while the appeal is pending; review is not necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; and most obviously, the parties have been deprived of the opportunity to develop a sufficient factual record. The United States's speculation about impairment to the right of innocent passage should not be indulged. Hypothetical conflicts are insufficient to justify preemption. *Seagram & Sons, supra,* at 45; *See also Barber v. State of Hawaii*, 42 F.3d 1185, 1189 (9th Cir. 1994).

A. The Strait of Juan de Fuca is comprised of internal waters.

Assuming for the sake of argument that innocent passage and/or the VTS Agreement was before the District Court, they do not preclude the BAPs within the Strait of Juan de Fuca. The Strait has historically been considered internal waters, thus not subject to the doctrine of innocent passage. All waters east of the entrance to the Strait consist of internal waters of British Columbia, the United States and the State of Washington.[14] In 1982, the U.S. Department of State "concur[red] in the conclusion that there is a sufficient historic claim to the Strait of Juan de Fuca as internal waters." *See also Re: Ownership of the bed of the Strait of Georgia*, 1 S.C.R. 388 (1984) (Canadian Supreme Court decision holding that Strait waters on the Canadian side are the historic, internal waters of British Columbia); Washington State Constitution, Art. XXIV, § 1; RCW 36.04 *et seq.* (prescribing that the territorial jurisdiction

14. Intertanko includes Arts. 37, 44, and 45 of the United Nations Convention on the Law of the Sea ("UNCLOS") in their appendix (right of transit/innocent passage through international straits). Intertanko App. at 301a-302a. Although not cited in the Petition, this inclusion suggests that Intertanko may substantively argue that the Strait of Juan de Fuca is an "international strait" to which "transit passage" applies. Intertanko is mistaken. The Strait of Juan de Fuca does not meet the geographical qualifications for an "international strait" because, *inter alia*, it consists of internal waters. *United States v. Alaska*, 521 U.S. 1, 18, 117 S. Ct. 1888 (1997) ("the character of the strait depends on the character of the waters to which a it leads"). If the Court reaches the issues of innocent and/or transit passage, classification of the waters within the Strait will be a necessary prerequisite for a proper analysis.

The classification of Canadian Strait waters as internal has already been made by the Canadian Supreme Court. *See Re: Ownership of the Bed of the Strait of Georgia*, 1 S.C.R. 388 (1984). The lower Court did not address this issue; only this Court has the authority to classify the Strait as internal waters. There are two indispensable parties for the Court to reach this issue: the state of Washington and the United States, both of whom are before the Court.

for Washington counties bordering the Strait extends seaward to the international demarcation line).

Once a vessel enters the Strait of Juan de Fuca, it has entered the internal waters of Washington State. Although never presented before this Court, in 1993 the Coast Guard explicitly acknowledged that "U.S. waters in the Strait of Juan de Fuca are **internal waters** of the United States. Tankers transiting the internal waters of the U.S. are subject to [federal regulations]. The principle of innocent passage only applies to vessels transiting the territorial seas of the U.S." 58 FR 27629 (1993) (emphasis added). As internal waters, any applicable international rules and regulations governing vessel operating procedures may not preempt reasonable, police power interests of the State. *See United States v. Alaska*, 521 U.S. 1, 5, 117 S. Ct. 1888 (1997).

Under the Submerged Lands Act, 43 U.S.C. §§ 1311 *et seq.* ("SLA"), internal waters provide a state with ownership of not only the submerged lands, but the natural resources within the water column. *United States v. California*, 436 U.S. at 39, 40, 98 S. Ct. 1662, 56 L. Ed. 2d 94 (1978) (the SLA implicates both "submerged lands and waters"). Therefore, the state owns the Strait waters concurrently with the United States. While the United States may prescribe navigational regulations over these waters, concurrent state regulations co-exist pursuant to the Tenth Amendment; "state ownership of submerged lands — which carries with it the power to control navigation, fishing, and other public uses of water — is an essential element of sovereignty." *United States v. Alaska*, *supra* at 5, *citing Utah Div. of State Lands v. United States*, 482 U.S. 193, 195, 107 S. Ct. 2318, 96 L. Ed. 2d 162 (1987). Internal waters "are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether." *United States v. Louisiana*, 394 U.S. 11, 22, n.24, 89 S. Ct. 773, 780 (1969).[15]

15. The historical internal waters status of the Strait of Juan de (Cont'd)

VI. THE BAPS DO NOT IMPAIR THE FOREIGN RELATIONS POWER OF THE UNITED STATES.

Petitioners disingenuously argue that the BAPs jeopardize the ability of the United States to speak with one voice on the international level and impairs U.S. treaty making credibility.[16] These arguments are not new to perceived international impacts of OPA § 1018. Graver concerns were expressed throughout the entire international community over OPA's promotion of non-uniform liability regimes, and the very real prospect of oil tankers facing state regimes which impose unlimited liability.[17]

(Cont'd)
Fuca is more relevant to the case at bar than the doctrine of innocent passage. If the Strait consists of territorial or international waters as the Petitioner's suggest, foreign warships could enter the Strait at will and unimpeded. TSC Art. 14; UNCLOS Arts. 17, 21. "According to Article 21 of [UNCLOS] the coastal [nation] does have the right to impose certain rules and regulations in regard to innocent passage, but it may not hamper, deny or impede the innocent passage of warships." Larson, D., *National Security Aspects of the United States Extension of the Territorial Sea to Twelve Nautical Miles*, 2 Territorial Sea Journal 189, 205 (1992).

16. Petitioners point to European nations which jointly commented on the BAPs, and to numerous law review articles addressing the cases below. U.S. at 26-27, Intertanko at 17, n.18. Contrary to assertions by the United States, there is no authority for the proposition that foreign diplomatic comments are entitled to deference by the Court. Moreover, the cited law review articles do not collectively champion the renunciation of the BAPs.

17. *See, e.g.*, Cooney, M., *The Stormy Seas of Oil Pollution Liability: Will Protection and Indemnity Clubs Survive?*, 16 Houston J. of Int'l L. 343, 347 (1993) ("transportation of oil to the United States could be severely disrupted . . ."); Eubank, S., *Patchwork Justice: State Unlimited Liability Laws in the Wake of the Oil Pollution Act of 1990*, 18 MD. J. Int'l L. & Trade 149, 150 (1994) ("[t]he fear of unlimited liability at the state level has generated . . . threats of trade-based retaliation against the United States"); Wilkinson, C., *et al.*, *Slick Work: An Analysis of the Oil Pollution Act of 1990*, 12 J. Energy, Nat. Resources & Envt'l L. 181, 235 (1992) ("[r]epresentatives of the oil transportation industry threaten to stop moving oil through United States ports unless they receive some relief from exposure to unlimited liability").

Specifically, OPA 90 arguably posed a threat to the stability of the international oil tanker insurance industry. Many critics cried that OPA's provision for unlimited state liability posed a real threat to future oil commerce within the United States. These arguments proved to be false; the oil shipping industry adjusted.[18] Any perceived impacts of the BAPs on international shipping pale in comparison to the financial threats posed by OPA's introduction of the potential for unlimited state liability regimes.

A. The BAPs are not preempted by the Foreign Affairs Clause.

The only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power is *Zschernig v. Miller*, 389 U.S. 429, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968). *Zschernig* involved an Oregon statute providing that a nonresident alien could not inherit from an Oregon decedent unless certain conditions were met. *See id.* at 440. The Supreme Court struck down the Oregon statute on the ground that it had "**more than 'some incidental or indirect effect** in foreign countries.' " *Id.* at 434 (*quoting Clark v. Allen*, 331 U.S. 503, 516-17, 67 S. Ct. 1431, 91 L. Ed. 1633 (1947)) (emphasis added).

A state statute with international implications is valid if it provides no discretion for state administrative officials "to comment on, [or] key their decisions to, the nature of foreign relations." *Id.* In order for a state regulation to frustrate U.S. foreign policy, its application must have more than an "incidental or indirect" effect on the foreign affairs of this country. *Zschernig*, at 434; *see also Clark*, at 516-17; *Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903, 913 (3rd Cir. 1990), *citing Zschernig* ("[o]n only one occasion has the Supreme Court struck down a statute as violative of the foreign relations power")

18. "The international operators . . . threatened decreased vessel availability for U.S. trades. . . . The doomsday predictions have, however, not come to pass and, indeed, new insurers and consortiums have emerged." Wyatt, *supra* at 25, n.181.

As the Ninth Circuit aptly noted, "Intertanko fail[ed] to point to any evidence in the record to establish that any "incidental burden[ ] on interstate and foreign commerce [is] clearly excessive in relation to the putative local benefits." *Intertanko II*, at 1069. In addition, both Petitioners failed to provide the Ninth Circuit with any evidence that even if the BAPs have an extraterritorial impact, that impact is anything more than "incidental or indirect." *Id.*

CONCLUSION

The decision below was a correct application of settled law. Moreover, the Ninth Circuit interpretation of OPA § 1018 was a case of first impression throughout the federal circuits; no circuit conflict exists to be resolved by the Court. The Petitioners' requests for certiorari should be denied.

Respectfully submitted,

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In The Supreme Court Of The United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, *PETITIONER*,

v.

GARY LOCKE ET. AL., *RESPONDENTS*.

INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), *PETITIONER*,

v.

GARY LOCKE ET AL., *RESPONDENTS*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE RESPONDENTS' BRIEF IN OPPOSITION

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39pp

PARTIES LISTED

Petitioners:

The International Association of Independent Tanker Owners (Intertanko).

The United States of America.

State Respondents:

Gary Locke, Governor of the State of Washington.

Christine O. Gregoire, Attorney General of the State of Washington.

Barbara Herman, Administrator of the Washington State Office of Marine Safety. Ms. Herman was succeeded by Tom Fitzsimmons, Director, Washington State Department of Ecology, when the Office of Marine Safety was merged into the Department of Ecology. Wash. Rev. Code § 88.46.921.

Respondents

James H. Krider, Snohomish County Prosecuting Attorney.

Natural Resources Defense Council.

Washington Environmental Council.

Ocean Advocates.

David McEachran, Whatcom County Prosecuting Attorney; Norman Maleng, King County Prosecuting Attorney; K. Carl Long , Skagit County Prosecuting Attorney. Mr. Long was succeeded in office by Tom Verge. In the district court, the parties entered into a stipulation that these three defendants would not participate in the case, but would be bound by the decision of the court.

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STATEMENT

The environmental damage caused by oil spills can be catastrophic. In 1989, the *Exxon Valdez* tore open on rocks and dumped 11 million gallons of oil into Prince William Sound, Alaska. The *Exxon Valdez* spill galvanized Congress to attack the problem of oil pollution from tankers by enacting the Oil Pollution Act of 1990, Pub. L. No. 101-380, August 18, 1990, 104 Stat. 484 (OPA 90).[1] OPA 90 was designed to prevent vessel-caused oil pollution by addressing all aspects of the problem including prevention, response, liability, and compensation for natural resource damages.

Washington followed Congress' lead in 1991 and exercised its police power to enact a comprehensive law to prevent pollution by providing the Best Achievable Protection (BAP) for state waters. The BAP rules are designed to prevent oil spills from tankers and are consistent with federal and international standards. This case does not require review. The decision of the Court of Appeals upholding the BAP rules[2] correctly applies the principles governing preemption set down by this Court, and there is no conflict among the Courts of Appeal or with a decision of this Court.

A. Washington's Waters Are A Priceless Resource And Navigation In Puget Sound Is Difficult

Washington's waters contain some of the richest and most diverse eco-systems in the world. The outer coast

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[1] The main provisions of OPA 90 are set out in the Appendix to the State Respondents' Brief In Opposition, which is a separate document. Appendix F provided by Intertanko contains OPA 90, but excludes Title I of the Act. Intertanko includes the provisions of Title I in the codified material in Appendix E at pages 114a-183a. Since OPA 90 is an important part of the case, it may be convenient for the Court to have a copy of OPA 90 that contains all the main provisions.

[2] The Court of Appeals did strike down one BAP rule dealing with technology. Wash. Admin. Code § 317-21-265; *Intertanko v. Locke*, 148 F.3d 1053, 1066-67 (1998), Intertanko App. A at 29a-32a. State respondents do not seek review of this ruling.

consists of wave-exposed rocky headlands separated by stretches of sand and gravel beaches. It includes two large estuaries, Grays Harbor and Willapa Bay. Puget Sound is an internal sea with habitat ranging from muddy bays to open rocky shores. The Strait of Juan de Fuca is a transition zone between the wave-exposed coast and the quieter Puget Sound waters. These waters support hundreds of different species of plants and animals. Shoreline vegetation covers 2,500 miles of Washington coast. There are 125 species of birds that spend some part of the year in Washington waters. Washington is also home to 5 species of salmon and 30 other species of fish, plus shrimp, clams, oysters, and scallops.

An oil spill in these waters would be devastating. Washington's waters are particularly vulnerable to damage from a spill. In Puget Sound, the water exchange is limited and sediments in shallow areas would be heavily contaminated. Even on the rocky coast damage could be extensive because it is home to long-lived, slow-growing species, such as mussels, that do not disperse well. Birds are particularly vulnerable. For example, between 175,000 and 300,000 Common Murres were killed in the *Exxon Valdez* spill. Washington's fishery could also be severely damaged through destruction of habitat and genetic damage to future generations.

It is also significant that most tanker traffic passes through Puget Sound to refineries located in the north and south. Puget Sound is a narrow body of water with navigational obstacles. Tankers going north must pass through Rosario Strait. The strait is so narrow that all vessels, both incoming and outgoing, must share a single lane. Tankers headed for the two Anacortes refineries must then pass through the narrow Guemes Channel. The currents in this channel are extremely strong, and the area is subject to frequent fog and a significant range of tides. Tankers headed north to the Cherry Point and Ferndale refineries must pass obstacles such as Peapod and Lummi Rocks. Tankers going south to Tacoma transit a somewhat broader waterway but the trip is long. It takes approximately 8 hours to travel from the Port Angeles

pilot station to Tacoma. The tanker must contend with significant congestion, including ferries crossing the traffic lanes and obstructions close to the western side of the southbound traffic lane.

B. The BAP Rules Were Adopted To Protect Washington's Priceless Marine Environment

In 1991, the Washington Legislature acted to protect "some of the most unique and special marine environments in the United States". 1991 Wash. Laws ch. 200, § 101. The Legislature recognized that these marine environments were threatened by "billions of gallons of crude oil and refined petroleum products . . . transported by vessel on the navigable waters of the state [each year]". *Id.* The Legislature concluded that "prevention is the best method to protect the unique and special marine environments in this state". *Id.*

To safeguard Washington waters, the Legislature created the Office of Marine Safety (OMS). 1991 Wash. Laws ch. 200, § 402.[3] OMS was directed to establish standards for spill prevention plans to provide "the best achievable protection from damages caused by the discharge of oil into the waters of the state". Wash. Rev. Code § 88.46.040(3). Owners and operators of tankers operating in Washington waters are required to file a spill prevention plan that meets the standards established by OMS. Wash. Rev. Code § 88.46.040. It is unlawful to operate a tanker in Washington waters without an approved prevention plan, and the statute provides civil and criminal penalties for such a violation. Wash. Rev. Code § 88.46.080-.090.[4] Under the rules, OMS conducts inspections

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[3] In 1991, the Office of Marine Safety was abolished and its powers and functions were transferred to the Department of Ecology. Wash. Rev. Code § 88.46.921.

[4] The law also provides that OMS may deny entry into state waters to any covered vessel that does not have a spill prevention plan. Washington has neither the authority nor the ability to actually deny entry into state waters. The state enforcement power is limited to civil and criminal penalties.

of tanker vessels in port in state waters to ensure that the tanker is complying with its approved plan. Wash. Admin. Code § 317-21-550. OMS does not perform the functions of the Coast Guard, and if a violation of a Coast Guard or other federal rule is discovered, it is to be reported to the appropriate agency. Wash. Rev. Code § 88.46.030(4).[5]

The oil spill prevention standards adopted by OMS as BAP rules were developed with the assistance of an advisory group that included the Coast Guard and tanker operators and managers. According to the Coast Guard, 60 to 80 percent of marine casualties are caused by human error. The BAP rules[6] address these human factors in three areas.

1. Operating Procedures—Wash. Admin. Code § 317-21-200 to –225

The operating procedures set out requirements for the operation of a tanker in the narrow congested waters of Puget Sound. For example, Wash. Admin. Code § 317-21-200(1) requires that navigation watch on the bridge consist of two licensed deck officers; and Wash. Admin. Code § 317-21-200(1)(a) requires that when the tanker is operating in restricted visibility, as determined by the master of the vessel, three licensed deck officers are required. The purpose is to avoid collisions and groundings—the two principal causes of catastrophic oil spills. Wash. Admin. Code § 317-21-205(1) requires the crew to constantly monitor navigation equipment and record the tanker's position every 15 minutes. A tanker will travel about 4 miles in this time, and the standard is designed to ensure that the tanker stays on course. Wash. Admin. Code § 317-21-210(1) provides that tankers without

[5] The rules also prohibit OMS from boarding a tanker for the purpose of making a substantial risk determination that the vessel poses a threat to the environment. Wash. Admin. Code § 317-31-210(3). The purpose of a tanker inspection is to determine if it complies with its spill prevention plan.

[6] The BAP rules are located in Intertanko's Appendix J (pages 307a-348a).

automatic switching gear for standby generators must operate with a standby generator running. Electricity powers most of a tanker's navigation equipment. Frequently, loss of electricity also results in a loss of propulsion. If power is lost in the main generator, standby power must be immediately available to prevent a collision or grounding. Wash. Admin. Code § 317-21-215 requires prearrival tests and inspections of critical systems, such as navigation equipment and steering systems. A failure of any of these systems, once a tanker is in Puget Sound, could also result in a collision or grounding.

2. Personnel Policies—Wash. Admin. Code § 317-21-230 to –255

Since 60 to 80 percent of accidents are caused by human error, training is critical to prevent oil spills. Wash. Admin. Code § 317-21-230(2) requires new personnel, who have not served on the same type of tanker, to receive an orientation of the new tanker. This will familiarize a new crewmember with the tanker layout. Wash. Admin. Code § 317-21-230(3) and (4) require position-specific and refresher training. Wash. Admin. Code § 317-21-235 deals with illicit drugs and alcohol. Washington has a zero tolerance policy for the use of illicit drugs or alcohol while a tanker is operating in Washington waters. Washington primarily follows the federal standard and applies it to all vessels, including foreign flag vessels. The main difference is that Washington requires random testing for drugs and alcohol. The purpose is to prevent crewmembers from becoming drug-impaired or intoxicated so they are unable to perform their duties.

3. Management Practices—Wash. Admin. Code § 317-21-260

Management oversight is a critical part of environmental protection. Wash. Admin. Code § 317-21-260 requires that vessel owners and operators have a management program that meets the International Maritime Organization's International Safety Management Code. It also requires preventive maintenance and plans for inspecting critical areas

of the vessel. The purpose of the management practices is to break the chain of human error that could endanger a tanker due to collision, grounding, or equipment failure.

C. Congress Enacted OPA 90 To Prevent And Respond To Oil Spills From Tankers

Washington adopted the BAP rules after Congress enacted OPA 90. Prior to the *Exxon Valdez* accident, there had been other smaller oil spills in the United States and there were several bills in Congress addressing the issue. The *Exxon Valdez* served as a wake-up call for Congress to take action, and Congress determined that spill prevention was critical. In the words of one Senate Report:

> "The oil spills over the past five months clearly show that we are not using–or have not yet developed–technology capable of containing spills of less than a million gallons, let alone spills the size of the *Exxon Valdez*. The spills of less than one million gallons also demonstrated that any oil spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment. *Consequently, preventing oil spills is more important than containing and cleaning them up quickly.*" S. Rep. No. 101-94, 101st Cong., 1st Sess., pp. 2-3 (1990) (second italics ours), *reprinted in* 1990 U.S.C.C.A.N. at 724.

OPA 90 imposed substantial new requirements to prevent oil pollution from tankers. Prevention measures included review of drug and alcohol abuse in issuing licenses, certificates of registry, and merchant mariners documents;[7] random drug testing and suspension of licenses, certificates of registry, and merchant mariners documents for drug and alcohol abuse;[8] and a requirement that working hours on a tanker be no more than 15 hours in any 24-hour period, or more than 36 hours in any 72-hour period.

[7] OPA 90 § 4101, State App. at 51a-52a.

[8] OPA 90 § 4103, State App. at 54a-57a.

As part of these prevention measures, Congress departed from international standards to provide increased protection for United States waters. Congress required tankers be constructed with double hulls by January 1, 2015.[9] This requirement applied to both United States and foreign flag tankers.

According to the United States, this was the only departure from international standards. United States Pet. at 8-9. This claim is simply not accurate. Until the double hull requirement went into effect, the Secretary of Transportation was required to adopt rules for single hull tankers operating in United States waters to "provide as substantial protection to the environment as is economically and technologically feasible". OPA 90 § 4115(b), State App. at 77a-78a. Thus, Congress wanted greater protection for United States waters until the double hull tankers came on line. In 1996, the Coast Guard issued the final rule to provide this additional protection. 61 Fed. Reg. 39770 (1996). In its rulemaking for single hull tankers, the Coast Guard responded to comments that it was "undermining the international process; that competency and manning requirements fall under flag state jurisdiction; and the [rule] goes beyond international requirements in some cases". 61 Fed. Reg. 39771 (1996). The Coast Guard responded by stating: "Where international standards do not address certain operations, the Coast Guard has met the intent of Congress by issuing these rules to ensure that specific vessels reduce their accident risk." 61 Fed. Reg. 39771 (1996).

In addition, OPA 90 required the Secretary of Transportation to adopt rules governing tanker operations with the auto-pilot engaged or with an unattended engine room.[10] Congress also required the Secretary to designate waters on which tankers must have two licensed deck officers on the

[9] OPA 90 § 4115(a), State App. at 72a-77a.

[10] OPA 90 § 4114(a), State App. at 70a.

bridge.[11] Although such manning and operation issues usually fall within the jurisdiction of the flag state, the Coast Guard concluded that the rules should "apply to foreign flag tankers and U.S. tankers sailing on registry because these tankers pose a similar risk to the environment". 58 Fed. Register 27628 (1993). Under the rule, a tanker must have two licensed deck officers on watch while operating in United States waters. One licensed engineer must keep watch in machinery spaces or in the main control space. The auto pilot may be engaged only under certain conditions. 33 C.F.R. § 164.13.

In addition to these prevention measures, OPA 90 contained new provisions imposing liability for spills and damage to natural resources.[12] OPA 90 also imposed new requirements for demonstrating financial responsibility.[13] These provisions also departed from the international oil pollution liability and compensation regime. OPA 90 also provided new authority for the President to ensure effective removal and mitigation in the event of an oil spill.[14]

In enacting all these new requirements, Congress specifically considered the question of preemption and expressly declined to preempt state law. OPA 90 section 1018 provides, in part:

> "(a) PRESERVATION OF STATE AUTHORITIES; SOLID WASTE DISPOSAL ACT.—*Nothing in this Act* or the Act of March 3, 1851 shall—
>
> (1) *affect, or be construed or interpreted as preempting, the authority of any State* or political subdivision *thereof from imposing any additional liability or requirements with respect to*—

[11] OPA 90 § 4116(b), State App. at 84a.

[12] OPA 90 § 1002-1006, State App. at 8a-25a.

[13] OPA 90 § 1016, State App. at 39a-43a.

[14] OPA 90 § 4201, State App. at 86a-95a.

> (A) *the discharge of oil or other pollution* by oil within such State; or
>
> (B) any removal activities in connection with such a discharge; or
>
> (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law.
>
> . . . .
>
> *(c) ADDITIONAL REQUIREMENTS AND LIABILITIES; PENALTIES.—Nothing in this Act*, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), *shall in any way affect, or be construed to affect, the authority of* the United States or *any State* or political subdivision thereof—
>
> (1) *to impose additional liability or additional requirements*: or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;
>
> *relating to the discharge, or substantial threat of a discharge, of oil.*" OPA 90 § 1018(a), (c) (italics ours), State App. at 46a-47a, 33 U.S.C.A. § 2718.

Section 1018 is a broadly worded statement of Congress' intent to preserve state authority.

REASONS WHY THE PETITIONS SHOULD BE DENIED

This Court should deny the petitions because the Court of Appeals correctly applied the preemption analysis laid down by this Court. There is no conflict with a decision of this Court or among the Courts of Appeals.

A. Principles Governing The Preemption Of State Law

The starting place for understanding this case is the law governing preemption. "The purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). The question of preemption "starts with the assumption that the historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress". *Cipollone*, 505 U.S. at 516 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal punctuation omitted).

There are three ways to overcome the presumption in favor of state law. The first is express preemption. A state law is preempted if Congress expressly so states in the language of the federal statute. *Cipollone*, 505 U.S. at 516 ("Congress' intent may be 'explicitly stated in the statute's language'"); *California v. ARC America Corp.*, 490 U.S. 93, 100 (1989). However, "Congress' enactment of a provision defining the preemptive reach of a statute *implies that matters beyond that reach are not preempted*". *Cipollone*, 505 U.S. at 517 (italics ours).

The second is implied field preemption. In the absence of an express congressional command, preemption may be implied

> "because the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it [or] because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject". *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230).

Although pervasive regulation may give rise to field preemption, the Court has rejected the "contention that pre-

emption is to be inferred merely from the comprehensive character of the federal work incentive provisions". *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973).

The third way to overcome the presumption in favor of state law is conflict preemption. Even if Congress has not expressly preempted state law or impliedly occupied the field, the "state law is pre-empted if that law actually conflicts with federal law". *Cipollone*, 505 U.S. at 516. A state law is in conflict with a federal law to the extent "it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress'". *California*, 490 U.S. at 100-01 (citations omitted).

B. Nature Of The Petitions' Preemption Claims

At the outset, neither Intertanko nor the United States claim that Congress has expressly stated its intent to preempt state health and safety laws that apply to oil tankers.[15] Although they cite various federal statutes and Coast Guard rules, petitioners focus on the Ports and Waterways Safety Act of 1972 (PWSA), Pub. L. No. 92-340, 86 Stat. 424 (1972), as amended. The claims of Intertanko and the United States, with respect to the PWSA, are distinctly different.

Intertanko's main claim is that Title II of the PWSA preempts the field of tanker regulation in the area of design, construction, equipment, and operation. According to Intertanko, Title I of the PWSA is not directly implicated in this litigation. Intertanko Br. at 3. Under Intertanko's theory, all state rules that touch the field of tanker design, construction, equipment, and operation are preempted.

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[15] Intertanko and the United States challenge the Court of Appeals decision that the Coast Guard simply cannot declare that state laws are preempted. This issue is discussed below at pages 28-30.

On the other hand, the United States does not maintain that the entire field has been preempted. Instead, the United States' claim appears to be based on conflict preemption. The Government argues that, under Title I of the PWSA, the state cannot regulate if the Coast Guard has adopted rules. Under this analysis, some state rules are valid and others are not. The United States argues that the case should be remanded so the district court can perform a rule by rule analysis.

Both petitioners cite a number of treaties to which the United States is a signatory. Neither petitioner appears to claim that these treaties preempt state law by themselves. Rather, petitioners focus on statutes and Coast Guard rules implementing the treaties. Petitioners also argue that the treaties illustrate Congress' desire for uniformity, which they contend is inconsistent with state regulation.

C. Title II Of The PWSA Does Not Preempt The Field Of Tanker Operations

The Court of Appeals ruled that Title II of the PWSA preempted the field of tanker design, construction, and equipment, but did not preempt the field of tanker operations. *Intertanko*, 148 F.3d at 1064-66, Intertanko App. at A 25a-29a. Intertanko argues that this holding conflicts with *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). It does not.

1. The Court Of Appeals Analysis Of Implied Field Preemption Does Not Conflict With *Ray*

Ray involved a Washington tanker law that imposed four requirements. First, the state required tankers from 40,000 to 125,000 dead-weight tons (DWT) to have certain standard safety features, including shaft horsepower in the ratio of 1 horsepower to each 2½ DWT; twin screws; double bottom; two radars in working order and operating, one of which must be collision avoidance radar; and other navigational position location systems as may be prescribed from time to time by the Board of Pilotage Commissioners. *Ray*, 435 U.S. at 160.

Second, the statute required a tug escort for any vessel that did not have the required safety features. *Id.*

Third, tankers of at least 50,000 DWT, engaged in either domestic or foreign trade, were required to take on pilots licensed by the state when navigating in Puget Sound. *Id.* at 158.

Fourth, the state excluded from Puget Sound, under any circumstances, a tanker in excess of 125,000 DWT, a so-called "supertanker". *Id.* at 173.

The Court struck down the first and fourth requirements because they intruded on the field of tanker construction and design where uniformity was important.[16] The Court said:

> "Enforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention to establish a *uniform federal regime controlling the design of oil tankers*." *Ray*, 435 U.S. at 165 (italics ours).

However, the Court was careful to limit the broad effects of field preemption to design and construction stating:

> "This statutory pattern shows that Congress, *insofar as design characteristics are concerned*, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States. This indicates to us that *Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements.* In particular, as we see it, Congress did not anticipate that a vessel found to be in compliance with the Secretary's design and construction regulations and holding a Secretary's permit, or its equivalent, to carry the relevant cargo

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[16] The Court also analyzed the ban on supertankers under Title I of the PWSA. *See infra* p. 24.

would nevertheless be barred by state law from operating in the navigable waters of the United States on the *ground that its design characteristics constitute an undue hazard.*" *Ray,* 435 U.S. at 163-64 (italics ours).

The Court specifically limited its ruling "insofar as design characteristics are concerned".

Moreover, the Court upheld the operational requirement that registered vessels in international trade take on a state pilot. *Id.* at 159-60 ("it is equally clear that [the states] are free to impose pilotage requirements on registered vessels entering and leaving their ports"). In sustaining this requirement, the Court specifically noted the requirement for a state pilot was not a design requirement. The Court said:

> "Of course, that a tanker is certified under federal law as a safe vessel insofar as its design and construction characteristics are concerned *does not mean that it is free to ignore otherwise valid state* or federal *rules* or regulations *that do not constitute design or construction specifications. Registered vessels*, for example, as we have already indicated, *must observe Washington's pilotage requirement.*" *Id.* at 168-69 (italics ours).

The Court also sustained the requirement for a tug escort. Once again, the Court specifically noted that the requirement for a tug escort was an *operating requirement*, not a design requirement. The Court said:

> "*A tug escort provision is not a design requirement*, such as is promulgated under Title II. *It is more akin to an operating rule* arising from the peculiarities of local waters[.]" *Id.* 171 (italics ours).

Ray stands for the proposition that Congress impliedly preempted the field of tanker design and construction. The fact that *Ray* upheld the pilotage and tug escort requirements refutes Intertanko's claims that operational requirements are preempted by Title II of the PWSA.

2. The Court Of Appeals Decision Is Consistent With Other Decisions Applying *Ray*

Review also is not warranted because the Court of Appeals decision is consistent with other decisions applying *Ray*. For example, in *Chevron U.S.A., Inc. v.* Hammond, 726 F.2d 483 (9th Cir. 1984), *cert. denied sub nom., Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140 (1985), the court upheld an Alaska statute that prohibits oil tankers from discharging ballast into the territorial waters of Alaska, if the ballast had been stored in the vessel's oil cargo tanks. The plaintiff claimed that this prohibition violated the PWSA, as amended. In sustaining the imposition of this operating requirement, the court interpreted *Ray* as limiting the issue of implied field preemption to design and construction:

> "*The [Ray] Court's finding of preemption is specifically limited to the regulation of vessel 'design characteristics'* and thus does not control the outcome of the present case involving ocean pollutant discharges. As a matter of fact, the court specifically explained that tankers must meet 'otherwise valid state or federal rules or regulations that do not constitute design or construction specifications.'" *Chevron*, 726 F.2d at 487 (footnote omitted) (italics ours).

Intertanko suggests that this case also presents an opportunity to review *Chevron* based on Justice White's dissent from the denial of certiorari in that case. Intertanko Pet. at 18 n.19. In fact, Justice White agreed that in *Ray* "we held that federal regulations governing oil tanker design and construction promulgated under Title II of the PWSA preempt more stringent state regulations covering the same subject matter". *Sheffield*, 471 U.S. at 1141. Justice White also noted:

> "The need for national uniformity in the area of standards for tanker operations, the [*Ray*] court concluded, is not so great as the need for uniformity in standards governing tanker operation and design; for while a tanker can under some circumstances alter its

> operating practices to conform to the requirements of the State whose territorial waters it is traversing, it cannot alter its construction or design. *Accordingly, the absence of uniform design and construction requirements may be a far more serious impediment to the tanker industry than a lack of uniformity with respect to operations.*" *Sheffield*, 471 U.S. at 1141-42 (italics ours).[17]

Another example of a consistent application of *Ray* is *Beveridge v. Lewis*, 939 F.2d 859 (9th Cir. 1991), which involved a city ordinance that prohibited a vessel from mooring or anchoring within 300 feet of a city wharf during certain months. Once again this was an operational requirement unrelated to design and construction. The plaintiff claimed that this ordinance violated the PWSA. The court began its analysis by acknowledging that the PWSA "now regulates much of the activity on or near navigable waterways". *Beveridge*, 939 F.2d at 861. However, the court concluded that the PWSA did not preempt the field because *Ray* held that "Congress did not so occupy the field of waterways and harbors that the state of Washington could not regulate". *Id.* at 862. "Just as *Ray* refused to find implicit preemption and proceeded to discuss the *actual* conflicts between Washington's Tanker Law and federal regulations, we cannot hold that the PWSA occupies the entire field of regulation of anchorage and mooring." *Beveridge*, 939 F.2d at 863 (italics in original).

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[17] While Justice White recognized the distinction between design and construction and operations, he was concerned that some operational rules were so closely linked with tanker design they would effectively prohibit a tanker from operating in a state's waters just as if the rule prohibited tankers of a certain design. He felt that the discharge of ballast might have such an impact. *Sheffield*, 471 U.S. at 1142 n.3. However, the BAP rules are not related to the design and construction of tankers. Instead, they go to the human factors that are responsible for 60 to 80 percent of marine casualties. Intertanko does not claim that the design and construction of tankers would prohibit them from operating in Washington waters if they complied with the BAP rules. Thus, Justice White's concern about operating procedures is not present in this case.

Even the United States appears to disagree with Intertanko's field preemption analysis. Intertanko acknowledges that before the Court of Appeals the United States posited that some BAP rules were valid. Intertanko Pet. at 13 n.15. In its petition, the Government also draws the distinction between field preemption of design and construction requirements under Title II of the PWSA and preemption of operational requirements under Title I.

> "In holding that the State's attempts to regulate the design of oil tankers were preempted, the [*Ray*] Court concluded that, in Title II of the PWSA . . . Congress 'has entrusted to the Secretary of Transportation the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States.' 435 U.S. at 163. . . . With respect to personnel, staffing, and operational requirements, the Court concluded that Washington's regulations were not automatically preempted by Title I of the PWSA[.]" U.S. Pet. at 7-8.

There is no basis for Intertanko's claim that Title II of the PWSA preempts the field of tanker operations and invalidates the BAP rules. Intertanko's petition should be denied.

D. The BAP Rules Are Not Subject To Conflict Preemption Because They Do Not Frustrate The Objectives Of Congress

The Government claims that some of the BAP Rules violate Title I of the PWSA, because they are in conflict with Coast Guard rules. A state law is in conflict with a federal law to the extent "it actually conflicts with federal law, that is, *when compliance with both state and federal law is impossible*, or when the state law '*stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress*'". *California*, 490 U.S. at 100-01 (citations omitted) (italics ours). In discovery at the district court, Intertanko agreed that it was not impossible to comply with the BAP rules, federal law, and Coast Guard rules. Nor

does the Government appear to be arguing impossibility. The question is whether the BAP rules stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. They do not. The Court of Appeals was correct in holding that the BAP rules are consistent with the purpose of Congress, which is to prevent oil spills from tankers. *Intertanko*, 148 F.2d at 1062-63, Intertanko App. A at 21a-24a.

1. The Objective Of Congress Is To Prevent Oil Spills From Tankers Including Additional State Requirements

Stung by the *Exxon Valdez* spill, Congress acted in OPA 90 to prevent oil spills from tankers on a number of fronts. It imposed the construction requirement of double hulls, it imposed new operating requirements, and set up new liability, compensation, and financial responsibility schemes. Congress also recognized that states have an important role to play. "The purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone*, 505 U.S. at 516. In OPA 90, Congress directly stated its purpose with regard to preemption. OPA 90 expressly preserves state authority to add additional requirements with regard to a discharge of oil or other pollution, or the substantial threat of a discharge. Section 1018 of OPA 90 provides, in part:

> "(a) PRESERVATION OF STATE AUTHORITIES; SOLID WASTE DISPOSAL ACT.—*Nothing in this Act* or the Act of March 3, 1851 shall—
>
> (1) *affect, or be construed or interpreted as preempting, the authority of any State* or political subdivision *thereof from imposing any additional liability or requirements with respect to*—
>
> (A) *the discharge of oil or other pollution* by oil within such State;
>
> . . . .

> *(c) ADDITIONAL REQUIREMENTS AND LIABILITIES; PENALTIES.—Nothing in this Act*, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), *shall in any way affect, or be construed to affect, the authority of* the United States or *any State* or political subdivision thereof—
>
> (1) *to impose additional liability or additional requirements*
>
> . . . .
>
> *relating to the discharge, or substantial threat of a discharge, of oil.*" OPA 90 § 1018(a)(1), (c)(1) (italics ours), State App. at 46-47, 33 U.S.C.A. § 2718(a)(1), (c)(1).

The language of subsections 1018(a)(1) and (c)(1) is very broad. Section 1018(a) states:

> "Nothing in this Act . . . shall (1) affect, or be construed or interpreted as preempting, the authority of any State . . . from imposing any additional . . . requirements with respect to (A) the discharge of oil or other pollution by oil within such state". OPA 90 § 1018(a).

Section 1018(c) states:

> "Nothing in this Act . . . shall in any way affect, or be construed to affect, the authority of . . . any State . . . (1) to impose . . . additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil". OPA 90 § 1018(c).

On its face, this non-preemptive language includes the provisions of OPA 90 enacted to prevent oil spills. Congress did not carve out discrete aspects of oil spill regulation that states would be allowed to impose. Instead, it used very broad language in subsections 1018(a)(1) and (c)(1) to signify its intent that *no* areas of state authority over the discharge of oil were preempted.

Section 1018 squarely addresses the issue of preemption and provides that states may impose additional liability and additional requirements. Congress' declaration that it is not preempting state authority is significant. As the Court said in *Cipollone*:

> "*When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue*, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority, *there is no need to infer congressional intent to pre-empt state laws* from the substantive provisions' of the legislation." *Cipollone*, 505 U.S. at 517 (citations omitted) (italics ours).

The legislative history of section 1018 leaves no doubt that Congress intended to permit states to impose more stringent oil spill prevention requirements. OPA 90 began as S 686 on the Senate side, and as HR 1465 on the House side. The non-preemptive language in S 686 was in section 106. The report from the Environment and Public Works Committee considering S 686 states:

> "Section 106 of the reported bill explicitly preserves the authority of *any State to impose its own requirements or standards with respect to discharges of oil within such State*. . . .
>
> . . . .
>
> "Preemption has been discussed by the members of the Committee more than any other single issue. S 686 does not embrace any preemption of State oil spill liability laws, State oil spill funds, or State fees, taxes, or penalties used to contribute to such funds. *The long-standing policy in environmental laws of not preempting State authority and recognizing the rights of States to determine for themselves the best way in which to protect their citizens, is clearly affirmed in S. 686.*" S. Rep. No. 101-94, 101st Cong., 1st Sess., pp. 17-18 (1989) (italics ours), *reprinted in* 1990 U.S.C.C.A.N. at 739-740.

The Senate passed S 686 and the House passed HR 1465. Since the bills differed, a conference committee was assigned to reconcile the differences. The joint explanatory statement of the conference committee, with regard to section 1018, states:

> "*Section 106 of the Senate amendment and section 1018 of the House bill* are generally similar provisions *preserving the authority of any State to impose its own requirements or standards with respect to discharge of oil within that State*. . . .
>
> The Conference substitute blends the provisions of the House and Senate bills, and adds a new subsection (d) pertaining to the liability of Federal employees.
>
> Thus, subsection (a) of section 1018 of the substitute *states explicitly that nothing in the substitute, or the Act of March 3, 1851* (the Limitation of Liability Act*), shall affect in any way the authority of a State* or local government to *impose additional* liability or other requirements with *respect to oil pollution or to the discharge of oil within that State* . . . .
>
> . . . .
>
> Similarly, subsection (c) clarifies that nothing in the substitute, the Limitation of Liability Act, or in section 9509 of the Internal Revenue Code shall affect in any way the_authority of the United States or any State or local government to impose additional liability or requirements, or to determine the amount of, any civil or criminal penalty for any violation of law.
>
> . . . .
>
> The Conference substitute does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield*

Company, 435 U.S. 151 (1978)." H.R. Conf. Rep. No. 101-653, 101st Cong., 2d Sess., pp. 121-22 (1990) (footnote omitted) (italics ours), *reprinted in* 1990 U.S.C.C.A.N. at 799-800.

When the conference committee blended the provisions of S 686 and HR 1465 to create OPA 90, it incorporated verbatim section 106(e) of S 686. This subsection was renumbered section 1018(c) in OPA 90. The Senate Report on S 686 explained section 106(e) as follows:

> "This subsection reinforces the position stated clearly elsewhere that *no aspect of state oil spill programs is preempted*, including the authority to impose additional requirements or penalties." S. Rep. No. 101-94, 101st Cong., 1st Sess., p. 18 (1989) (italics our), *reprinted in* 1990 U.S.C.C.A.N. at 740.

The Government focuses on the sentence that the conference committee substitute does not disturb *Ray v. Atlantic Richfield Co.* U.S. Pet. at 20. The reference to *Ray* actually confirms the broad scope of section 1018. *Ray* held that only the field of tanker design and construction was preempted. Section 4115(a) of OPA 90 imposes a design requirement of double hulls. Since nothing in the Act prevents states from imposing additional requirements, the language might allow states into the area of design and construction. The reference to *Ray* indicates that the conference committee did not intend this result.

The Government's argument that the BAP rules frustrate the objectives of Congress is based on a view that Congress' main objective was international uniformity. OPA 90 refutes this claim. In addition to requiring double hulls, Congress also required additional protection measures for foreign flag tankers operating in United States waters. *See supra* p. 7-8. OPA 90 also departed from the international regime in liability, compensation, and financial responsibility. Congress' main concern was preventing oil spills from tankers, not conforming to international standards.

Moreover, the claim of international uniformity is illusory. The Government points out that flag states are responsible for issuing certificates certifying that ships registered under their flag comply with international standards. However, there are many "flags of convenience" which maintain an open register. This allows any vessel to be registered under the country's flag even though it has no connection with the country. In many open registers the flag state does have the capability of supervising the safety of ships. As Lord Donaldson's report[18] concluded in 1994, four years after OPA 90:

> "The vice of 'open' registers is twofold. First, in practice they lead to varying standards of safety. . . . Second, the existence of 'open' registers and the consequent ease with which ships can be transferred to a different register and flag has lead to some shipowners shopping around for the registers which have the lowest standards of enforcement and which, in consequence, involve them in the least expense." Lord Donaldson, ¶ 6.12

This lack of uniformity was echoed in 1996 by the Organisation for Economic Co-operation and Development[19], which stated:

> "In spite of this tightening-up process, shipping is still a largely free market which allows considerable scope for shipowners, *inter alia*, to: i) determine vessel operating policy including the level of expenditure on safety-related maintenance cost items, and ii) avoid compliance with internationally agreed rules and

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[18] Lord Donaldson, London:HMSO, *Safer Ships, Cleaner Seas* (May 1994).

[19] Directorate for Science, Technology and Industry Maritime Transport Committee, Organisation for Economic Co-operation and Development, Paris, *Non-Observance Of International Rules And Standards: Competitive Advantages* (January 1996).

regulations as regards safety and the protection of the marine environment." Directorate, at 3 (italics theirs).

Thus, allowing states to apply their health and safety laws to oil tankers does not impair a uniform international system, because international uniformity is lacking.

2. The Court Of Appeals Decision That There Is No Conflict Preemption Does Not Conflict With *Ray*

The Government argues that the Court of Appeals decision conflicts with *Ray* because *Ray* requires preemption under Title I of the PWSA whenever a national standard exists in a federal statute or regulation addressing the same subject matter as the state requirement. U.S. Pet. at 15. *Ray* analyzed two requirements under Title I. It struck down the law that banned tankers of 125,000 DWT from Puget Sound.[20] The reason the Court invalidated the requirement is that the Coast Guard had adopted a rule that permitted these so called super tankers on Puget Sound. *Ray*, 435 U.S. at 174-75. Since it was impossible to comply with both the Coast Guard rule and the state law, the state law was preempted.

On the other hand, the Court upheld the requirement for a tug escort, because there was no Coast Guard rule. However, the Court did not conclude that the adoption of a Coast Guard rule would necessarily preempt the tug escort requirement. *Ray*, 435 U.S. at 172 ("It may be that rules will be forthcoming that will pre-empt the State's present tug-escort rule, but until that occurs, the State's requirement need not give way under the Supremacy Clause."). The question of preemption ultimately would turn on whether it was possible to comply with both the Coast Guard and state tug escort rule.

[20] The Court also struck down this provision as a design requirement under Title II of the PWSA. *Ray*, 435 U.S. at 175-76.

3. The BAP Rules Are Consistent With Federal Law And International Standards

The United States' petition sets out examples of BAP rules it claims are inconsistent with federal law and international standards. U.S. Pet. at 17-20. This argument is not well taken. The BAP rules are consistent with federal and international standards. In some cases they are virtually identical. The BAP rules are also consistent with the intent of Congress to prevent oil spills from tankers.

Wash. Admin. Code § 317-21-200(1)(a) Navigation Watch—Restricted Visibility

Wash. Admin. Code § 317-21-200(1) provides that the navigation watch shall consist of two licensed deck officers. This is the same requirement imposed by 33 C.F.R. 164.13(c), which was adopted as a result of OPA 90. *See supra* p. 8. The only difference is that when the master or officer in charge determines the tanker is operating in restricted visibility a third deck officer shall be added. Wash. Admin. Code § 317-21-200(1)(a).

This requirement is fully consistent with federal law and international standards. The federal rule does not prohibit a third officer during restricted visibility and under international standards prudent seamanship may require it. The Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS) were implemented by the Coast Guard in 33 C.F.R. Part 81. The term "restricted visibility" is defined as "any condition in which visibility is restricted by fog, mist, falling snow, heavy rainstorms, sandstorms or any other similar causes". 33 C.F.R. Part 81, Rule 3(l). The rules require that every "vessel shall have due regard to the prevailing circumstances and conditions of restricted visibility when complying with the Rules". *Id.* at Rule 19(c). Similarly, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW) provides: "When deciding the composition of the watch on the bridge, which may include

appropriately qualified ratings, the following factors, *inter alia*, shall be taken into account: . . . weather conditions, visibility and whether there is daylight or darkness." STCW § A-VIII/1.17.2.

A prudent master complying with international standards may well choose to have a third deck officer on the bridge during restricted visibility, but others may not. Given the difficulty of navigation in Puget Sound, Washington requires the third deck officer in limited circumstances. This requirement is consistent with federal law and international standards and is an important step in preventing collisions and groundings.

The Government also complains that the sensible step of having a third licensed deck officer in restricted visibility violates the international rules for crew rest, such that additional crew members would have to be flown to the vessel before entering Washington waters. This claim is wrong. First, the requirement only applies during restricted visibility, and since the third officer may be a pilot, an extra deck officer from the tanker's crew is needed only in the 60 miles between buoy J and Port Angeles where pilotage waters begin. Second, the rules for rest would not prohibit a licensed deck officer from fulfilling the requirement. The STCW provides: "The requirements for rest periods laid down in paragraphs 1 and 2 need not be maintained in the case of an emergency or drill or *in other overriding operational conditions*." STCW § A-VIII/1.3 (italics ours). Restricted visibility is an overriding operational condition. Of course, additional rest for a crewman might be required later, but this does not mean that the vessel needs to provide additional crew to come to Washington.

Wash. Admin. Code § 317-21-235
Drug and Alcohol Testing and Reporting

In OPA 90 § 4103(a)(1), Congress required the Secretary to adopt drug testing and reporting rules. Washington applies the Coast Guard rules for United States flagged tankers to foreign flagged tankers. In addition,

Washington requires random drug and alcohol testing for all. This requirement applies only to vessels covered by a plan filed with the Department of Ecology. Washington has extended the drug and alcohol requirement to foreign flagged vessels because a drug-impaired or intoxicated crew member of a foreign flagged vessel is just as likely to cause a collision or grounding as a drug-impaired or intoxicated crew member of a United States flagged vessel. Both could cause an oil spill. There are no international requirements relating to drug and alcohol abuse. STCW § B-VIII/2, Part 5 referred to by the Government (U.S. Pet. at 18 n.11) provides only guidance. It does not even purport to impose a requirement on flag states. Given that alcohol was a significant issue in the *Exxon Valdez* spill, the Washington drug and alcohol rule is a prudent requirement to prevent oil spills.

The Government also expresses the concern that the laws of some nations prohibit the testing required by Washington. This concern is unfounded. The record in this case establishes that Washington waives the requirement if the testing and reporting violate the laws of the flag state or if enforcing the requirement would cause noncompliance with an existing collective bargaining agreement. Second Aff. Stanley J. Norman at 4, SER at 661.

Wash. Admin. Code § 317-21-230
Training

Since 60 to 80 percent of marine casualties are caused by human error, training is vital in preventing oil spills. Wash. Admin. Code § 317-21-230 sets out training requirements. The Government claims that this training goes beyond the international standards and would require crews to be flown to Washington for training. This is simply wrong. In fact, Wash. Admin. Code § 317-21-230 is very similar to the training required under the STCW. *See* STCW §§ A-II/2 (specifications of minimum standard of competence for masters and chief mates on ships of 500 gross tonnage or more); A-III/2 (specifications of minimum standard of

competence for chief engineer officers and second engineer officers on ships powered by main propulsion machinery of 3,000 kW propulsion power of more); A-II/1 (specifications of minimum standard of competence for officers in charge of a navigational watch on ships of 500 gross tonnage or more); A-III/1 (specifications of minimum standard of competence for officers in charge of an engineering watch in a manned engine-room or designated duty engineers in a periodically unmanned engine-room); A-IV/1 (specifications of minimum standard of competence for GMDSS radio operators); A-VI/1 (mandatory minimum requirements for familiarization and basic safety training and instruction for all seafarers); A-VIII/2, Part III (Watchkeeping at sea).

Wash. Admin. Code § 317-21-250(1)
Language

Washington requires that licensed deck officers "speak a language understood and spoken by subordinate officers and unlicensed crew". Wash. Admin. Code § 317-21-250(1). Communication is vital in preventing accidents. If a deck officer gives an order that is not understood, the result could be an oil spill caused by a collision or grounding. Under the Washington requirement, an officer must be able to communicate with the crew on the officer's watch or crew the officer supervises. This also is the international standard which requires licensed deck officers to "perform the officer's duties also with a multi-lingual crew". STCW A-II/1 tbl. at 7 (English Language). Once again, Washington is consistent with the international standard.

E. The Court Of Appeals Correctly Concluded That The Coast Guard Lacked The Authority To Declare That State Laws Are Preempted

In adopting a few of its rules, the Coast Guard has made statements in the federal register that it intended to preempt state law. Intertanko and the Government make one common claim that the Court of Appeals erred in ruling that the Coast Guard lacked the authority to declare in its rulemaking that

state laws are preempted. It is certainly true that federal regulations may also preempt state law. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982). However, the Court of appeals concluded the Coast Guard was acting beyond the scope of its congressionally delegated authority. The Court looked at the intent of Congress in enacting OPA 90 section 1018 and concluded: "In view of Congress's unwillingness to preempt state oil-spill prevention efforts on its own, we find implausible the argument that it intended to delegate power to the Coast Guard to do so." *Intertanko*, 148 F.3d at 1068, Intertanko App. A at 34a. The Court of Appeals decision on this point correctly applies the decision of this Court.

The Court of Appeals looked to see whether the Coast Guard was legally authorized to preempt state law. This is exactly how this Court analyzed the question in *City of New York v. FCC*, 486 U.S. 57 (1988), which concerned a provision in the Cable Communications Policy Act of 1984, 98 Stat. 2780. The Act left cable franchising to state and local authorities who were also empowered to specify the facilities and equipment that franchisees were to use, provided such requirements were consistent with this title. In 1985, the FCC forbid local cable franchising authorities from imposing their own standards. *City of New York*, 486 U.S. at 61-62.

The first issue was whether Congress had to expressly grant an agency the power to preempt. After concluding that Congress did not have to expressly authorize an agency to preempt, the Court went on to the "second part of the inquiry [which] is whether the Commission is legally authorized to pre-empt state and local regulation[s]". *City of New York*, 486 U.S. at 66. According to the Court:

> "We have identified at least two reasons why this part of the inquiry is crucial to our determination of the pre-emption issue. 'First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers

> power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the Agency.' *Louisiana Public Service Comm'n*, 476 U.S. at 374[.]" *City of New York*, 486 U.S. at 66.

The Court of Appeals followed the analysis laid out in *City of New York* and concluded that Congress did not confer the power to preempt. This conclusion is correct. Passed in the wake of the *Exxon Valdez* oil spill, OPA 90 was a departure from the "business as usual" approach to preventing oil spills. Congress imposed stricter requirements than the minimum international standards and refused to follow the international scheme for spill liability. Congress also recognized the state's right to impose additional requirements.

CONCLUSION

For these reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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In The Supreme Court
Of The
United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, *PETITIONER*,

v.

GARY LOCKE ET. AL., *RESPONDENTS*.

INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), *PETITIONER*,

v.

GARY LOCKE ET AL., *RESOPNDENTS*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO STATE RESPONDENTS' BRIEF IN OPPOSITION

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1428

OIL POLLUTION ACT OF 1990

PUBLIC LAW 101-380
August 8, 1990

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TITLE I–OIL POLLUTION LIABILITY AND COMPENSATION

Sec. 1001. DEFINITIONS.

(33 U.S.C.A. § 2701)

For the purposes of this Act, the term–

(1) "act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight;

(2) "barrel" means 42 United States gallons at 60 degrees fahrenheit;

(3) "claim" means a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an incident;

(4) "claimant" means any person or government who presents a claim for compensation under this title;

(5) "damages" means damages specifiedin section 1002(b) of this Act, and includes the cost of assessing these damages;

(6) "deepwater port" is a facility licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524);

(7) "discharge" means any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping;

(8) "exclusive economic zone" means the zone established by Presidential Proclamation Numbered 5030, dated March 10, 1983, including the ocean waters of the areas referred to as "eastern special areas" in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990;

(9) "facility" means any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes;

(10) "foreign offshore unit" means a facility which is located, in whole or in part, in the territorial sea or on the continental shelf of a foreign country and which is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the seabed beneath the foreign country's territorial sea or from the foreign country's continental shelf;

(11) "Fund" means the Oil Spill Liability Trust Fund, established by section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509);

(12) "gross ton" has the meaning given that term by the Secretary under part J of title 46, United States Code;

(13) "guarantor" means any person, other than the responsible party, who provides evidence of financial responsibility for a responsible party under this Act;

(14) "incident" means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil;

(15) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and has governmental authority over lands belonging to or controlled by the tribe;

(16) "lessee" means a person holding a leasehold interest in an oil or gas lease on lands beneath navigable waters (as that term is defined in section 2(a) of the Submerged Lands Act (43 U.S.C. 1301(a))) or on submerged lands of the Outer Continental Shelf, granted or maintained under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.);

(17) "liable" or "liability" shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321);

(18) "mobile offshore drilling unit" means a vessel (other than a self- elevating lift vessel) capable of use as an offshore facility;

(19) "National Contingency Plan" means the National Contingency Plan prepared and published under section 311(d)

of the Federal Water Pollution Control Act, as amended by this Act, or revised under section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9605);

(20) "natural resources" includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government;

(21) "navigable waters" means the waters of the United States, including the territorial sea;

(22) "offshore facility" means any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

(23) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include petroleum, including crude oil or any fraction thereof, which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act;

(24) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(25) the term "Outer Continental Shelf facility" means an offshore facility which is located, in whole or in part, on the Outer Continental Shelf and is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the Outer Continental Shelf;

(26) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, the vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(27) "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body;

(28) "permittee" means a person holding an authorization, license, or permit for geological exploration issued under section 11 of the Outer Continental Shelf Lands Act (43 U.S.C. 1340) or applicable State law;

(29) "public vessel" means a vessel owned or bareboat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce;

(30) "remove" or "removal" means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(31) "removal costs" means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident;

(32) "responsible party" means the following:

(A) VESSELS.–In the case of a vessel, any person owning, operating, or demise chartering the vessel.

(B) ONSHORE FACILITIES.–In the case of an onshore facility (other than a pipeline), any person owning or operating the facility, except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(C) OFFSHORE FACILITIES.–In the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.)), the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(D) DEEPWATER PORTS.–In the case of a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524), the licensee.

(E) PIPELINES. In the case of a pipeline, any person owning or operating the pipeline.

(F) ABANDONMENT.–In the case of an abandoned vessel, onshore facility, deepwater port, pipeline, or offshore facility, the persons who would have been responsible parties immediately prior to the abandonment of the vessel or facility.

(33) "Secretary" means the Secretary of the department in which the Coast Guard is operating;

(34) "tank vessel" means a vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue, and that–

(A) is a vessel of the United States;

(B) operates on the navigable waters; or

(C) transfers oil or hazardous material in a place subject to the jurisdiction of the United States;

(35) "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of 3 miles;

(36) "United States" and "State" mean the several States of the United States, the District of Columbia, the

Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession of the United States; and

(37) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel.

SEC. 1002. ELEMENTS OF LIABILITY.
(33 U.S.C.A. § 2702)

(a) IN GENERAL.–Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.

(b) COVERED REMOVAL COSTS AND DAMAGES.–

(1) REMOVAL COSTS.–The removal costs referred to in subsection (a) are–

(A) all removal costs incurred by the United States, a State, or an Indian tribe under subsection (c), (d), (e), or (l) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, under the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.), or under State law; and

(B) any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan.

(2) DAMAGES.–The damages referred to in subsection (a) are the following:

(A) NATURAL RESOURCES.–Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.

(B) REAL OR PERSONAL PROPERTY.–Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.

(C) SUBSISTENCE USE.–Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.

(D) REVENUES.–Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.

(E) PROFITS AND EARNING CAPACITY.–Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.

(F) PUBLIC SERVICES.–Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State.

(c) EXCLUDED DISCHARGES.–This title does not apply to any discharge–

(1) permitted by a permit issued under Federal, State, or local law;

(2) from a public vessel; or

(3) from an onshore facility which is subject to the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.).

(d) LIABILITY OF THIRD PARTIES.–

(1) IN GENERAL.–

(A) THIRD PARTY TREATED AS RESPONSIBLE PARTY.–Except as provided in subparagraph (B), in any case in which a responsible party establishes that a discharge or

threat of a discharge and the resulting removal costs and damages were caused solely by an act or omission of one or morethird parties described in section 1003(a)(3) (or solely by such an act or omission in combination with an act of God or an act of war), the third party or parties shall be treated as the responsible party or parties for purposes of determining liability under this title.

(B) SUBROGATION OF RESPONSIBLE PARTY.–If the responsible party alleges that the discharge or threat of a discharge was caused solely by an act or omission of a third party, the responsible party–

(i) in accordance with section 1013, shall pay removal costs and damages to any claimant; and

(ii) shall be entitled by subrogation to all rights of the United States Government and the claimant to recover removal costs or damages from the third party or the Fund paid under this subsection.

(2) LIMITATION APPLIED.–

(A) OWNER OR OPERATOR OF VESSEL OR FACILITY.–If the act or omission of a third party that causes an incident occurs in connection with a vessel or facility owned or operated by the third party, the liability of the third party shall be subject to the limits provided

in section 1004 as applied with respect to the vessel or facility.

(B) OTHER CASES.–In any other case, the liability of a third party or parties shall not exceed the limitation which would have been applicable to the responsible party of the vessel or facility from which the discharge actually occurred if the responsible party were liable.

SEC. 1003. DEFENSES TO LIABILITY.
(33 U.S.C.A. § 2703)

(a) COMPLETE DEFENSES.–A responsible party is not liable for removal costs or damages under section 1002 if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by–

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail), if the responsible party establishes, by a preponderance of the evidence, that the responsible party–

(A) exercised due care with respect to the oil concerned, taking into consideration the

characteristics of the oil and in light of all relevant facts and circumstances; and

(B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions; or

(4) any combination of paragraphs (1), (2), and (3).

(b) DEFENSES AS TO PARTICULAR CLAIMANTS.–A responsible party is not liable under section 1002 to a claimant, to the extent that the incident is caused by the gross negligence or willful misconduct of the claimant.

(c) LIMITATION ON COMPLETE DEFENSE.–Subsection (a) does not apply with respect to a responsible party who fails or refuses–

(1) to report the incident as required by law if the responsible party knows or has reason to know of the incident;

(2) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or

(3) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

SEC. 1004. LIMITS ON LIABILITY.
(33 U.S.C.A. § 2704)

(a) GENERAL RULE.–Except as otherwise provided in this section, the total of the liability of a responsible party under section 1002 and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed–

(1) for a tank vessel, the greater of–

(A) $1,200 per gross ton; or

(B)(i) in the case of a vessel greater than 3,000 gross tons, $10,000,000; or

(ii) in the case of a vessel of 3,000 gross tons or less, $2,000,000;

(2) for any other vessel, $600 per gross ton or $500,000, whichever is greater;

(3) for an offshore facility except a deepwater port, the total of all removal costs plus $75,000,000; and

(4) for any onshore facility and a deepwater port, $350,000,000.

(b) DIVISION OF LIABILITY FOR MOBILE OFFSHORE DRILLING UNITS.–

(1) TREATED FIRST AS TANK VESSEL.–For purposes of determining the responsible party and applying this Act and except as provided in paragraph (2), a mobile offshore drilling unit which is being used

as an offshore facility is deemed to be a tank vessel with respect to the discharge, or the substantial threat of a discharge, of oil on or above the surface of the water.

(2) TREATED AS FACILITY FOR EXCESS LIABILITY.–To the extent that removal costs and damages from any incident described in paragraph (1) exceed the amount for which a responsible party is liable (as that amount may be limited under subsection (a)(1)), the mobile offshore drilling unit is deemed to be an offshore facility. For purposes of applying subsection (a)(3), the amount specified in that subsection shall be reduced by the amount for which the responsible party is liable under paragraph (1).

(c) EXCEPTIONS.–

(1) ACTS OF RESPONSIBLE PARTY.–Subsection (a) does not apply if the incident was proximately caused by–

(A) gross negligence or willful misconduct of, or

(B) the violation of an applicable Federal safety, construction, or operating regulation by,

the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).

(2) FAILURE OR REFUSAL OF RESPONSIBLE PARTY.–Subsection (a does not apply if the responsible party fails or refuses–

(A) to report the incident as required by law and the responsible party knows or has reason to know of the incident;

(B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or

(C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, or the Intervention on the High Sea Act (33 U.S.C. 1471 et seq.).

(3) OCS FACILITY OR VESSEL.–Notwithstanding the limitations established under subsection (a) and the defenses of section 1003, all removal costs incurred by the United States Government or any State or local official or agency in connection with a discharge or substantial threat of a discharge of oil from any Outer Continental Shelf facility or a vessel carrying oil as cargo from such a facility shall be borne by the owner or operator of such facility or vessel.

(d) ADJUSTING LIMITS OF LIABILITY.–

(1) ONSHORE FACILITIES.–Subject to paragraph (2), the President may establish by regulation, with respect to any class or category of onshore facility, a limit of liability under this section of less than $350,000,000, but not less than $8,000,000, taking into account size, storage capacity, oil

throughput, proximity to sensitive areas, type of oil handled, history of discharges, and other factors relevant to risks posed by the class or category of facility.

(2) DEEPWATER PORTS AND ASSOCIATED VESSELS.–

(A) STUDY.–The Secretary shall conduct a study of the relative operational and environmental risks posed by the transportation of oil by vessel to deepwater ports (as defined in section 3 of the Deepwater Port Act of 1974 (33 U.S.C. 1502)) versus the transportation of oil by vessel to other ports. The study shall include a review and analysis of offshore lightering practices used in connection with that transportation, an analysis of the volume of oil transported by vessel using those practices, and an analysis of the frequency and volume of oil discharges which occur in connection with the use of those practices.

(B) REPORT.–Not later than 1 year after the date of the enactment of this Act, the Secretary shall submit to the Congress a report on the results of the study conducted under subparagraph (A).

(C) RULEMAKING PROCEEDING.–If the Secretary determines, based on the results of the study conducted under this subparagraph (A), that the use of deepwater ports in connection with the transportation of oil by vessel results in a lower operational or environmental risk than the use of other ports,

the Secretary shall initiate, not later than the 180th day following the date of submission of the report to the Congress under subparagraph (B), a rulemaking proceeding to lower the limits of liability under this section for deepwater ports as the Secretary determines appropriate. The Secretary may establish a limit of liability of less than $350,000,000, but not less than $50,000,000, in accordance with paragraph (1).

(3) PERIODIC REPORTS.–The President shall, within 6 months after the date of the enactment of this Act, and from time to time thereafter, report to the Congress on the desirability of adjusting the limits of liability specified in subsection (a).

(4) ADJUSTMENT TO REFLECT CONSUMER PRICE INDEX.–The President shall, by regulations issued not less often than every 3 years, adjust the limits of liability specified in subsection (a) to reflect significant increases in the Consumer Price Index.

SEC. 1005. INTEREST.
(33 U.S.C.A. § 2705)

(a) GENERAL RULE.–The responsible party or the responsible party's guarantor is liable to a claimant for interest on the amount paid in satisfaction of a claim under this Act for the period described in subsection (b).

(b) PERIOD.–

(1) IN GENERAL.–Except as provided in paragraph (2), the period for which interest shall be paid is the period beginning on the 30th day following the

date on which the claim is presented to the responsible party or guarantor and ending on the date on which the claim is paid.

(2) EXCLUSION OF PERIOD DUE TO OFFER BY GUARANTOR.–If the guarantor offers to the claimant an amount equal to or greater than that finally paid in satisfaction of the claim, the period described in paragraph (1) does not include the period beginning on the date the offer is made and ending on the date the offer is accepted. If the offer is made within 60 days after the date on which the claim is presented under section 1013(a), the period described in paragraph (1) does not include any period before the offer is accepted.

(3) EXCLUSION OF PERIODS IN INTERESTS OF JUSTICE.–If in any period a claimant is not paid due to reasons beyond the control of the responsible party or because it would not serve the interests of justice, no interest shall accrue under this section during that period.

(4) CALCULATION OF INTEREST.–The interest paid under this section shall be calculated at the average of the highest rate for commercial and finance company paper of maturities of 180 days or less obtaining on each of the days included within the period for which interest must be paid to the claimant, as published in the Federal Reserve Bulletin.

(5) INTEREST NOT SUBJECT TO LIABILITY LIMITS.–

(A) IN GENERAL.–Interest (including prejudgment interest) under this paragraph is in

addition to damages and removal costs for which claims may be asserted under section 1002 and shall be paid without regard to any limitation of liability under section 1004.

(B) PAYMENT BY GUARANTOR.–The payment of interest under this subsection by a guarantor is subject to section 1016(g).

SEC. 1006. NATURAL RESOURCES.
(33 U.S.C.A. § 2706)

(a) LIABILITY.–In the case of natural resource damages under section 1002(b)(2)(A), liability shall be–

(1) to the United States Government for natural resources belonging to, managed by, controlled by, or appertaining to the United States;

(2) to any State for natural resources belonging to, managed by, controlled by, or appertaining to such State or political subdivision thereof;

(3) to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such Indian tribe; and

(4) in any case in which section 1007 applies, to the government of a foreign country for natural resources belonging to, managed by, controlled by, or appertaining to such country.

(b) DESIGNATION OF TRUSTEES.–

(1) IN GENERAL.–The President, or the authorized representative of any State, Indian tribe, or

foreign government, shall act on behalf of the public, Indian tribe, or foreign country as trustee of natural resources to present a claim for and to recover damages to the natural resources.

(2) FEDERAL TRUSTEES.–The President shall designate the Federal officials who shall act on behalf of the public as trustees for natural resources under this Act.

(3) STATE TRUSTEES.–The Governor of each State shall designate State and local officials who may act on behalf of the public as trustee for natural resources under this Act and shall notify the President of the designation.

(4) INDIAN TRIBE TRUSTEES.–The governing body of any Indian tribe shall designate tribal officials who may act on behalf of the tribe or its members as trustee for natural resources under this Act and shall notify the President of the designation.

(5) FOREIGN TRUSTEES.–The head of any foreign government may designate the trustee who shall act on behalf of that government as trustee for natural resources under this Act.

(c) FUNCTIONS OF TRUSTEES.–

(1) FEDERAL TRUSTEES.–The Federal officials designated under subsection (b)(2)–

(A) shall assess natural resource damages under section 1002(b)(2)(A) for the natural resources under their trusteeship;

(B) may, upon request of and reimbursement from a State orIndian tribe and at the Federal officials' discretion, assess damages for the natural resources under the State's or tribe's trusteeship; and

(C) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

(2) STATE TRUSTEES.–The State and local officials designated under subsection (b)(3)–

(A) shall assess natural resource damages under section 1002(b)(2)(A) for the purposes of this Act for the natural resources under their trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

(3) INDIAN TRIBE TRUSTEES.–The tribal officials designated under subsection (b)(4)–

(A) shall assess natural resource damages under section 1002(b)(2)(A) for the purposes of this Act for the natural resources under their trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

(4) FOREIGN TRUSTEES.–The trustees designated under subsection (b)(5)–

(A) shall assess natural resource damages under section 1002(b)(2)(A) for the purposes of this Act for the natural resources under their trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

(5) NOTICE AND OPPORTUNITY TO BE HEARD.–Plans shall be developed and implemented under this section only after adequate public notice, opportunity for a hearing, and consideration of all public comment.

(d) MEASURE OF DAMAGES.–

(1) IN GENERAL.–The measure of natural resource damages under section 1002(b)(2)(A) is–

(A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;

(B) the diminution in value of those natural resources pending restoration; plus

(C) the reasonable cost of assessing those damages.

(2) DETERMINE COSTS WITH RESPECT TO PLANS.–Costs shall be determined under paragraph (1) with respect to plans adopted under subsection (c).

(3) NO DOUBLE RECOVERY.–There shall be no double recovery under this Act for natural resource damages, including with respect to the costs of damage assessment or restoration, rehabilitation, replacement, or acquisition for the same incident and natural resource.

(e) DAMAGE ASSESSMENT REGULATIONS.–

(1) REGULATIONS.–The President, acting through the Under Secretary of Commerce for Oceans and Atmosphere and in consultation with the Administrator of the Environmental Protection Agency, the Director of the United States Fish and Wildlife Service, and the heads of other affected agencies, not later than 2 years after the date of the enactment of this Act, shall promulgate regulations for the assessment of natural resource damages under section 1002(b)(2)(A) resulting from a discharge of oil for the purpose of this Act.

(2) REBUTTABLE PRESUMPTION.–Any determination or assessment of damages to natural resources for the purposes of this Act made under subsection (d) by a Federal, State, or Indian trustee in accordance with the regulations promulgated under paragraph (1) shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act.

(f) USE OF RECOVERED SUMS.–Sums recovered under this Act by a Federal, State, Indian, or foreign trustee for natural resource damages under section 1002(b)(2)(A) shall be retained by the trustee in a revolving trust account, without further appropriation, for use only to reimburse or pay costs incurred by the trustee under subsection (c) with respect to the damaged natural resources. Any amounts in excess of those required for these reimbursements and costs shall be deposited in the Fund.

(g) COMPLIANCE.–Review of actions by any Federal official where there is alleged to be a failure of that official to perform a duty under this section that is not discretionary with that official may be had by any person in the district court in which the person resides or in which the alleged damage to natural resources occurred. The court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party. Nothing in this subsection shall restrict any right which any person may have to seek relief under any other provision of law.

SEC. 1007. RECOVERY BY FOREIGN CLAIMANTS.
(33 U.S.C.A. § 2707)

(a) REQUIRED SHOWING BY FOREIGN CLAIMANTS.–

(1) IN GENERAL.–In addition to satisfying the other requirements of this Act, to recover removal costs or damages resulting from an incident a foreign claimant shall demonstrate that–

(A) the claimant has not been otherwise compensated for the removal costs or damages; and

(B) recovery is authorized by a treaty or executive agreement between the United States and the claimant's country, or the Secretary of State, in consultation with the Attorney General and other appropriate officials, has certified that the claimant's country provides a comparable remedy for United States claimants.

(2) EXCEPTIONS.–Paragraph (1)(B) shall not apply with respect to recovery by a resident of Canada in the case of an incident described in subsection (b)(4).

(b) DISCHARGES IN FOREIGN COUNTRIES.–A foreign claimant may make a claim for removal costs and damages resulting from a discharge, or substantial threat of a discharge, of oil in or on the territorial sea, internal waters, or adjacent shoreline of a foreign country, only if the discharge is from–

(1) an Outer Continental Shelf facility or a deepwater port;

(2) a vessel in the navigable waters;

(3) a vessel carrying oil as cargo between 2 places in the United States; or

(4) a tanker that received the oil at the terminal of the pipeline constructed under the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.), for transportation to a place in the United States, and the discharge or threat occurs prior to delivery of the oil to that place.

(c) FOREIGN CLAIMANT DEFINED.–In this section, the term "foreign claimant" means–

(1) a person residing in a foreign country;

(2) the government of a foreign country; and

(3) an agency or political subdivision of a foreign country.

SEC. 1008. RECOVERY BY RESPONSIBLE PARTY.
(33 U.S.C.A. § 2708)

(a) IN GENERAL.–The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 1013 only if the responsible party demonstrates that–

(1) the responsible party is entitled to a defense to liability under section 1003; or

(2) the responsible party is entitled to a limitation of liability under section 1004.

(b) EXTENT OF RECOVERY.–A responsible party who is entitled to a limitation of liability may assert a claim under section 1013 only to the extent that the sum of the removal costs and damages incurred by the responsible party plus the amounts paid by the responsible party, or by the guarantor on behalf of the responsible party, for claims asserted under section 1013 exceeds the amount to which the total of the liability under section 1002 and removal costs and damages incurred by, or on behalf of, the responsible party is limited under section 1004.

SEC. 1009. CONTRIBUTION.
(33 U.S.C.A. § 2709)

A person may bring a civil action for contribution against any other person who is liable or potentially liable under this Act or another law. The action shall be brought in accordance with section 1017.

SEC. 1010. INDEMNIFICATION AGREEMENTS.
(33 U.S.C.A. § 2710)

(a) AGREEMENTS NOT PROHIBITED.–Nothing in this Act prohibits any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this Act.

(b) LIABILITY NOT TRANSFERRED.–No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer liability imposed under this Act from a responsible party or from any person who may be liable for an incident under this Act to any other person.

(c) RELATIONSHIP TO OTHER CAUSES OF ACTION.–Nothing in this Act, including the provisions of subsection (b), bars a cause of action that a responsible party subject to liability under this Act, or a guarantor, has or would have, by reason of subrogation or otherwise, against any person.

SEC. 1011. CONSULTATION ON REMOVAL ACTIONS.
(33 U.S.C.A. § 2711)

The President shall consult with the affected trustees designated under section 1006 on the appropriate removal

action to be taken in connection with any discharge of oil. For the purposes of the National Contingency Plan, removal with respect to any discharge shall be considered completed when so determined by the President in consultation with the Governor or Governors of the affected States. However, this determination shall not preclude additional removal actions under applicable State law.

SEC. 1012. USES OF THE FUND.
(33 U.S.C.A. § 2712)

(a) USES GENERALLY.–The Fund shall be available to the President for–

(1) the payment of removal costs, including the costs of monitoring removal actions, determined by the President to be consistent with the National Contingency Plan–

(A) by Federal authorities; or

(B) by a Governor or designated State official under subsection (d);

(2) the payment of costs incurred by Federal, State, or Indian tribe trustees in carrying out their functions under section 1006 for assessing natural resource damages and for developing and implementing plans for the restoration, rehabilitation, replacement, or acquisition of the equivalent of damaged resources determined by the President to be consistent with the National Contingency Plan;

(3) the payment of removal costs determined by the President to be consistent with the National Contingency Plan as a result of, and damages resulting

from, a discharge, or a substantial threat of a discharge, of oil from a foreign offshore unit;

(4) the payment of claims in accordance with section 1013 for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages;

(5) the payment of Federal administrative, operational, and personnel costs and expenses reasonably necessary for and incidental to the implementation, administration, and enforcement of this Act (including, but not limited to, sections 1004(d)(2), 1006(e), 4107, 4110, 4111, 4112, 4117, 5006, 8103, and title VII) and subsections (b), (c), (d), (j), and (l) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, with respect to prevention, removal, and enforcement related to oil discharges, provided that–

(A) not more than $25,000,000 in each fiscal year shall be available to the Secretary for operating expenses incurred by the Coast Guard;

(B) not more than $30,000,000 each year through the end of fiscal year 1992 shall be available to establish the National Response System under section 311(j) of the Federal Water Pollution Control Act, as amended by this Act, including the purchase and prepositioning of oil spill removal equipment; and

(C) not more than $27,250,000 in each fiscal year shall be available to carry out title VII of this Act.

(b) DEFENSE TO LIABILITY FOR FUND.–The Fund shall not be available to pay any claim for removal costs or damages to a particular claimant, to the extent that the incident, removal costs, or damages are caused by the gross negligence or willful misconduct of that claimant.

(c) OBLIGATION OF FUND BY FEDERAL OFFICIALS.–The President may promulgate regulations designating one or more Federal officials who may obligate money in accordance with subsection (a).

(d) ACCESS TO FUND BY STATE OFFICIALS.–

(1) IMMEDIATE REMOVAL.–In accordance with regulations promulgated under this section, the President, upon the request of the Governor of a State or pursuant to an agreement with a State under paragraph (2), may obligate the Fund for payment in an amount not to exceed $250,000 for removal costs consistent with the National Contingency Plan required for the immediate removal of a discharge, or the mitigation or prevention of a substantial threat of a discharge, of oil.

(2) AGREEMENTS.–

(A) IN GENERAL.–The President shall enter into an agreement with the Governor of any interested State to establish procedures under which the Governor or a designated State official may receive payments from the Fund for removal costs pursuant to paragraph (1).

(B) TERMS.–Agreements under this paragraph–

(i) may include such terms and conditions as may be agreed upon by the President and the Governor of a State;

(ii) shall provide for political subdivisions of the State to receive payments for reasonable removal costs; and

(iii) may authorize advance payments from the Fund to facilitate removal efforts.

(e) REGULATIONS.–The President shall–

(1) not later than 6 months after the date of the enactment of this Act, publish proposed regulations detailing the manner in which the authority to obligate the Fund and to enter into agreements under this subsection shall be exercised; and

(2) not later than 3 months after the close of the comment period for such proposed regulations, promulgate final regulations for that purpose.

(f) RIGHTS OF SUBROGATION.–Payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

(g) AUDITS.–The Comptroller General shall audit all payments, obligations, reimbursements, and other uses of the Fund, to assure that the Fund is being properly administered and that claims are being appropriately and expeditiously considered. The Comptroller General shall submit to the

Congress an interim report one year after the date of the enactment of this Act. The Comptroller General shall thereafter audit the Fund as is appropriate. Each Federal agency shall cooperate with the Comptroller General in carrying out this subsection.

(h) PERIOD OF LIMITATIONS FOR CLAIMS.–

(1) REMOVAL COSTS.–No claim may be presented under this title for recovery of removal costs for an incident unless the claim is presented within 6 years after the date of completion of all removal actions for that incident.

(2) DAMAGES.–No claim may be presented under this section for recovery of damages unless the claim is presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care, or in the case of natural resource damages under section 1002(b)(2)(A), if later, the date of completion of the natural resources damage assessment under section 1006(e).

(3) MINORS AND INCOMPETENTS.–The time limitations contained in this subsection shall not being to run–

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for the minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on

which a legal representative is duly appointed for the incompetent.

(i) LIMITATION ON PAYMENT FOR SAME COSTS.–In any case in which the President has paid an amount from the Fund for any removal costs or damages specified under subsection (a), no other claim may be paid from the Fund for the same removal costs or damages.

(j) OBLIGATION IN ACCORDANCE WITH PLAN.–

(1) IN GENERAL.–Except as provided in paragraph (2), amounts may be obligated from the Fund for the restoration, rehabilitation, replacement, or acquisition of natural resources only in accordance with a plan adopted under section 1006(c).

(2) EXCEPTION.–Paragraph (1) shall not apply in a situation requiring action to avoid irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources or similar need for emergency action.

(k) PREFERENCE FOR PRIVATE PERSONS IN AREA AFFECTED BY DISCHARGE.–

(1) IN GENERAL.–In the expenditure of Federal funds for removal of oil, including for distribution of supplies, construction, and other reasonable and appropriate activities, under a contract or agreement with a private person, preference shall be given, to the extent feasible and practicable, to private persons residing or doing business primarily in the area affected by the discharge of oil.

(2) LIMITATION.–This subsection shall not be considered to restrict the use of Department of Defense resources.

SEC. 1013. CLAIMS PROCEDURE.
(33 U.S.C.A. § 2713)

(a) PRESENTATION.–Except as provided in subsection (b), all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 1014(a).

(b) PRESENTATION TO FUND.–

(1) IN GENERAL.–Claims for removal costs or damages may be presented first to the Fund–

(A) if the President has advertised or otherwise notified claimants in accordance with section 1014(c);

(B) by a responsible party who may assert a claim under section 1008;

(C) by the Governor of a State for removal costs incurred by that State; or

(D) by a United States claimant in a case where a foreign offshore unit has discharged oil causing damage for which the Fund is liable under section 1012(a).

(2) LIMITATION ON PRESENTING CLAIM.–No claim of a person against the Fund may be approved or certified during the pendency of an action

by the person in court to recover costs which are the subject of the claim.

(c) ELECTION.–If a claim is presented in accordance with subsection (a) and–

(1) each person to whom the claim is presented denies all liability for the claim, or

(2) the claim is not settled by any person by payment within 90 days after the date upon which

(A) the claim was presented, or

(B) advertising was begun pursuant to section 1014(b), whichever is later,

the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.

(d) UNCOMPENSATED DAMAGES.–If a claim is presented in accordance with this section and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund.

(e) PROCEDURE FOR CLAIMS AGAINST FUND.–The President shall promulgate, and may from time to time amend, regulations for the presentation, filing, processing, settlement, and adjudication of claims under this Act against the Fund.

SEC. 1014. DESIGNATION OF SOURCE AND ADVERTISEMENT.

(33 U.S.C.A. § 2714)

(a) DESIGNATION OF SOURCE AND NOTIFICATION.–When the President receives information of an incident, the President shall, where possible and appropriate, designate the source or sources of the discharge or threat. If a designated source is a vessel or a facility, the President shall immediately notify the responsible party and the guarantor, if known, of that designation.

(b) ADVERTISEMENT BY RESPONSIBLE PARTY OR GUARANTOR.–If a responsible party or guarantor fails to inform the President, within 5 days after receiving notification of a designation under subsection (a), of the party's or the guarantor's denial of the designation, such party or guarantor shall advertise the designation and the procedures by which claims may be presented, in accordance with regulations promulgated by the President. Advertisement under the preceding sentence shall begin no later than 15 days after the date of the designation made under subsection (a). If advertisement is not otherwise made in accordance with this subsection, the President shall promptly and at the expense of the responsible party or the guarantor involved, advertise the designation and the procedures by which claims may be presented to the responsible party or guarantor. Advertisement under this subsection shall continue for a period of no less than 30 days.

(c) ADVERTISEMENT BY PRESIDENT.–If–

(1) the responsible party and the guarantor both deny a designation within 5 days after receiving notification of a designation under subsection (a),

(2) the source of the discharge or threat was a public vessel, or

(3) the President is unable to designate the source or sources of the discharge or threat under subsection (a),

the President shall advertise or otherwise notify potential claimants of the procedures by which claims may be presented to the Fund.

SEC. 1015. SUBROGATION.
(33 U.S.C.A. § 2715)

(a) IN GENERAL.–Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.

(b) ACTIONS ON BEHALF OF FUND.–At the request of the Secretary, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this Act, and all costs incurred by the Fund by reason of the claim, including interest (including prejudgment interest), administrative and adjudicative costs, and attorney's fees. Such an action may be commenced against any responsible party or (subject to section 1016) guarantor, or against any other person who is liable, pursuant to any law, to the compensated claimant or to the Fund, for the cost or damages for which the compensation was paid. Such an action shall be commenced against the responsible foreign government or other responsible party to recover any removal costs or damages paid from the Fund as the result of the discharge, or substantial threat of discharge, of oil from a foreign offshore unit.

SEC. 1016. FINANCIAL RESPONSIBILITY.
(33 U.S.C.A. § 2716)

(a) REQUIREMENT.–The responsible party for–

(1) any vessel over 300 gross tons (except a non-self-propelled vessel that does not carry oil as cargo or fuel) using any place subject to the jurisdiction of the United States; or

(2) any vessel using the waters of the exclusive economic zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States;

shall establish and maintain, in accordance with regulations promulgated by the Secretary, evidence of financial responsibility sufficient to meet the maximum amount of liability to which, in the case of a tank vessel, the responsible party could be subject under section 1004(a)(1) or (d) of this Act, or to which, in the case of any other vessel, the responsible party could be subject under section 1004(a)(2) or (d), in a case where the responsible party would be entitled to limit liability under that section. If the responsible party owns or operates more than one vessel, evidence of financial responsibility need be established only to meet the amount of the maximum liability applicable to the vessel having the greatest maximum liability.

(b) SANCTIONS.–

(1) WITHHOLDING CLEARANCE.–The Secretary of the Treasury shall withhold or revoke the clearance required by section 4197 of the Revised Statutes of the United States of any vessel subject to

this section that does not have the evidence of financial responsibility required for the vessel under this section.

(2) DENYING ENTRY TO OR DETAINING VESSELS.–The Secretary may–

(A) deny entry to any vessel to any place in the United States, or to the navigable waters, or

(B) detain at the place,

any vessel that, upon request, does not produce the evidence of financial responsibility required for the vessel under this section.

(3) SEIZURE OF VESSEL.–Any vessel subject to the requirements of this section which is found in the navigable waters without the necessary evidence of financial responsibility for the vessel shall be subject to seizure by and forfeiture to the United States.

(c) OFFSHORE FACILITIES.–

(1) IN GENERAL.–Except as provided in paragraph (2), each responsible party with respect to an offshore facility shall establish and maintain evidence of financial responsibility of $150,000,000 to meet the amount of liability to which the responsible party could be subjected under section 1004(a) in a case in which the responsible party would be entitled to limit liability under that section. In a case in which a person is the responsible party for more than one facility subject to this subsection, evidence of financial responsibility need be established only to meet the maximum liability

applicable to the facility having the greatest maximum liability.

(2) DEEPWATER PORTS.–Each responsible party with respect to a deepwater port shall establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability to which the responsible party could be subjected under section 1004(a) of this Act in a case where the responsible party would be entitled to limit liability under that section. If the Secretary exercises the authority under section 1004(d)(2) to lower the limit of liability for deepwater ports, the responsible party shall establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability so established. In a case in which a person is the responsible party for more than one deepwater port, evidence of financial responsibility need be established only to meet the maximum liability applicable to the deepwater port having the greatest maximum liability.

(e) METHODS OF FINANCIAL RESPONSIBILITY.–Financial responsibility under this section may be established by any one, or by any combination, of the following methods which the Secretary (in the case of a vessel) or the President (in the case of a facility) determines to be acceptable: evidence of insurance, surety bond, guarantee, letter of credit, qualification as a self-insurer, or other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States. In promulgating requirements under this section, the Secretary or the President, as appropriate, may specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable, in establishing evidence of financial responsibility to effectuate the purposes of this Act.

(f) CLAIMS AGAINST GUARANTOR.–Any claim for which liability may be established under section 1002 may be asserted directly against any guarantor providing evidence of financial responsibility for a responsible party liable under that section for removal costs and damages to which the claim pertains. In defending against such a claim, the guarantor may invoke (1) all rights and defenses which would be available to the responsible party under this Act, (2) any defense authorized under subsection (e), and (3) the defense that the incident was caused by the willful misconduct of the responsible party. The guarantor may not invoke any other defense that might be available in proceedings brought by the responsible party against the guarantor.

(g) LIMITATION ON GUARANTOR'S LIABILITY.–Nothing in this Act shall impose liability with respect to an incident on any guarantor for damages or removal costs which exceed, in the aggregate, the amount of financial responsibility required under this Act which that guarantor has provided for a responsible party.

(h) CONTINUATION OF REGULATIONS.–Any regulation relating to financial responsibility, which has been issued pursuant to any provision of law repealed or superseded by this Act, and which is in effect on the date immediately preceding the effective date of this Act, is deemed and shall be construed to be a regulation issued pursuant to this section. Such a regulation shall remain in full force and effect unless and until superseded by a new regulation issued under this section.

(i) UNIFIED CERTIFICATE.–The Secretary may issue a single unified certificate of financial responsibility for purposes of this Act and any other law.

SEC. 1017. LITIGATION, JURISDICTION, AND VENUE.

(33 U.S.C.A. § 2717)

(a) REVIEW OF REGULATIONS.–Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within 90 days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) JURISDICTION.–Except as provided in subsections (a) and (c), the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the discharge or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) STATE COURT JURISDICTION.–A State trial court of competent jurisdiction over claims for removal costs or damages, as defined under this Act, may consider claims under this Act or State law and any final judgment of such court (when no longer subject to ordinary forms of review) shall be recognized, valid, and enforceable for all purposes of this Act.

(d) ASSESSMENT AND COLLECTION OF TAX.–The provisions of subsections (a), (b), and (c) shall not apply to any controversy or other matter resulting from the assessment

or collection of any tax, or to the review of any regulation promulgated under the Internal Revenue Code of 1986.

(e) SAVINGS PROVISION.–Nothing in this title shall apply to any cause of action or right of recovery arising from any incident which occurred prior to the date of enactment of this title. Such claims shall be adjudicated pursuant to the law applicable on the date of the incident.

(f) PERIOD OF LIMITATIONS.–

(1) DAMAGES.–Except as provided in paragraphs (3) and (4), an action for damages under this Act shall be barred unless the action is brought within 3 years after–

(A) the date on which the loss and the connection of the loss with the discharge in question are reasonably discoverable with the exercise of due care, or

(B) in the case of natural resource damages under section 1002(b)(2)(A), the date of completion of the natural resources damage assessment under section 1006(c).

(2) REMOVAL COSTS.–An action for recovery of removal costs referred to in section 1002(b)(1) must be commenced within 3 years after completion of the removal action. In any such action described in this subsection, the court shall enter a declaratory judgment on liability for removal costs or damages that will be binding on any subsequent action or actions to recover further removal costs or damages. Except as otherwise provided in this paragraph, an action may be commenced under this title for recovery

of removal costs at any time after such costs have been incurred.

(3) CONTRIBUTION.–No action for contribution for any removal costs or damages may be commenced more than 3 years after–

(A) the date of judgment in any action under this Act for recovery of such costs or damages, or

(B) the date of entry of a judicially approved settlement with respect to such costs or damages.

(4) SUBROGATION.–No action based on rights subrogated pursuant to this Act by reason of payment of a claim may be commenced under this Act more than 3 years after the date of payment of such claim.

(5) COMMENCEMENT.–The time limitations contained herein shall not begin to run–

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

SEC. 1018. RELATIONSHIP TO OTHER LAW.
(33 U.S.C.A. § 2718)

(a) PRESERVATION OF STATE AUTHORITIES; SOLID WASTE DISPOSAL ACT.–Nothing in this Act or the Act of March 3, 1851 shall–

(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to–

(A) the discharge of oil or other pollution by oil within such State; or

(B) any removal activities in connection with such a discharge; or

(2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law.

(b) PRESERVATION OF STATE FUNDS.–Nothing in this Act or in section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509) shall in any way affect, or be construed to affect, the authority of any State–

(1) to establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or

(2) to require any person to contribute to such a fund.

(c) ADDITIONAL REQUIREMENTS AND LIABILITIES; PENALTIES.–Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof–

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;

relating to the discharge, or substantial threat of a discharge, of oil.

(d) FEDERAL EMPLOYEE LIABILITY.–For purposes of section 2679(b)(2)(B) of title 28, United States Code, nothing in this Act shall be construed to authorize or create a cause of action against a Federal officer or employee in the officer's or employee's personal or individual capacity for any act or omission while acting within the scope of the officer's or employee's office or employment.

SEC. 1019. STATE FINANCIAL RESPONSIBILITY.
(33 U.S.C.A. § 2719)

A State may enforce, on the navigable waters of the State, the requirements for evidence of financial responsibility under section 1016.

SEC. 1020. APPLICATION.
(33 U.S.C.A. §§ 2701-2719 NOTE)

This Act shall apply to an incident occurring after the date of the enactment of this Act.

TITLE II–CONFORMING AMENDMENTS

SEC. 2001. INTERVENTION ON THE HIGH SEAS ACT.

Section 17 of the Intervention on the High Seas Act (33 U.S.C. 1486) is amended to read as follows:

"SEC. 17. The Oil Spill Liability Trust Fund shall be available to the Secretary for actions taken under sections 5 and 7 of this Act.".

SEC. 2002. FEDERAL WATER POLLUTION CONTROL ACT.

(a) APPLICATION.–Subsections (f), (g), (h), and (i) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321) shall not apply with respect to any incident for which liability is established under section 1002 of this Act.

(b) CONFORMING AMENDMENTS.–Section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321) is amended as follows:

(1) Subsection (i) is amended by striking "(1)" after "(i)" and by striking paragraphs (2) and (3).

(2) Subsection (k) is repealed.

Any amounts remaining in the revolving fund established under that subsection shall be deposited in the Fund. The Fund shall assume all liability incurred by the revolving fund established under that subsection.

(3) Subsection (l) is amended by striking the second sentence.

(4) Subsection (p) is repealed.

(5) The following is added at the end thereof:

"(s) The Oil Spill Liability Trust Fund established under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509) shall be available to carry out subsections (b), (c), (d), (j), and (l) as those subsections apply to discharges, and substantial threats of discharges, of oil. Any amounts received by the United States under this section shall be deposited in the Oil Spill Liability Trust Fund.".

SEC. 2003. DEEPWATER PORT ACT.

(a) CONFORMING AMENDMENTS.–The Deepwater Port Act of 1974 (33 U.S.C. 1502 et seq.) is amended–

(1) in section 4(c)(1) by striking "section 18(1) of this Act;" and inserting "section 1016 of the Oil Pollution Act of 1990"; and

(2) by striking section 18.

(b) AMOUNTS REMAINING IN DEEPWATER PORT FUND.–Any amounts remaining in the Deepwater Port Liability Fund established under section 18(f) of the Deepwater

Port Act of 1974 (33 U.S.C. 1517(f)) shall be deposited in the Oil Spill Liability Trust Fund established under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509). The Oil Spill Liability Trust Fund shall assume all liability incurred by the Deepwater Port Liability Fund.

SEC. 2004. OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978.

Title III of the Outer Continental Shelf Lands Act Amendments of 1978 (43 U.S.C. 1811-1824) is repealed.

Any amounts remaining in the Offshore Oil Pollution Compensation Fund established under section 302 of that title (43 U.S.C. 1812) shall be deposited in the Oil Spill Liability Trust Fund established under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509). The Oil Spill Liability Trust Fund shall assume all liability incurred by the Offshore Oil Pollution Compensation Fund.

TITLE III–INTERNATIONAL OIL POLLUTION PREVENTION AND REMOVAL

SEC. 3001. SENSE OF CONGRESS REGARDING PARTICIPATION IN INTERNATIONAL REGIME.

It is the sense of the Congress that it is in the best interests of the United States to participate in an international oil pollution liability and compensation regime that is at least as effective as Federal and State laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from incidents.

. . . .

TITLE IV–PREVENTION AND REMOVAL

Subtitle A–Prevention

SEC. 4101. REVIEW OF ALCOHOL AND DRUG ABUSE AND OTHER MATTERS IN ISSUING LICENSES, CERTIFICATES OF REGISTRY, AND MERCHANT MARINERS' DOCUMENTS.

(a) LICENSES AND CERTIFICATES OF REGISTRY.–Section 7101 of title 46, United States Code, is amended by adding at the end the following:

"(g) The Secretary may not issue a license or certificate of registry under this section unless an individual applying for the license or certificate makes available to the Secretary, under section 206(b)(7) of the National Driver Register Act of 1982 (23 U.S.C. 401 note), any information contained in the National Driver Register related to an offense described in section 205(a)(3)(A) or (B) of that Act committed by the individual.

"(h) The Secretary may review the criminal record of an individual who applies for a license or certificate or registry under this section.

"(i) The Secretary shall require the testing of an individual who applies for issuance or renewal of a license or certificate of registry under this chapter for use of a dangerous drug in violation of law or Federal regulation.".

(b) MERCHANT MARINERS' DOCUMENTS.–Section 7302 of title 46, United States Code, is amended by adding at the end the following:

"(c) The Secretary may not issue a merchant mariner's document under this chapter unless the individual applying for the document makes available to the Secretary, under section 206(b)(7) of the National Driver Register Act of 1982 (23 U.S.C. 401 note), any information contained in the National Driver Register related to an offense described in section 205(a)(3)(A) or (B) of that Act committed by the individual.

"(d) The Secretary may review the criminal record of an individual who applies for a merchant mariner's document under this section.

"(e) The Secretary shall require the testing of an individual applying for issuance or renewal of a merchant mariner's document under this chapter for the use of a dangerous drug in violation of law or Federal regulation.".

SEC. 4102. TERM OF LICENSES, CERTIFICATES OF REGISTRY, AND MERCHANT MARINERS' DOCUMENTS; CRIMINAL RECORD REVIEWS IN RENEWALS.

(a) LICENSES.–Section 7106 of title 46, United States Code, is amended by inserting "and may be renewed for additional 5-year periods" after "is valid for 5 years".

(b) CERTIFICATES OF REGISTRY.–Section 7107 of title 46, United States Code, is amended by striking "is not limited in duration." and inserting "is valid for 5 years and may be renewed for additional 5-year periods.".

(c) MERCHANT MARINERS' DOCUMENTS.–Section 7302 of title 46, United States Code, is amended by adding at the end the following:

"(f) A merchant mariner's document issued under this chapter is valid for 5 years and may be renewed for additional 5-year periods.".

(d) TERMINATION OF EXISTING LICENSES, CERTIFICATES, AND DOCUMENTS.–A license, certificate of registry, or merchant mariner's document issued before the date of the enactment of this section terminates on the day it would have expired if–

(1) subsections (a), (b), and (c) were in effect on the date it was issued; and

(2) it was renewed at the end of each 5-year period under section 7106, 7107, or 7302 of title 46, United States Code.

(e) CRIMINAL RECORD REVIEW IN RENEWALS OF LICENSES AND CERTIFICATES OF REGISTRY.–

(1) IN GENERAL.–Section 7109 of title 46, United States Code, is amended to read as follows:

"§ 7109. Review of criminal records

"The Secretary may review the criminal record of each holder of a license or certificate of registry issued under this part who applies for renewal of that license or certificate of registry.".

(2) CLERICAL AMENDMENT.–The analysis for chapter 71 of title 46, United States Code, is amended by striking the item relating to section 7109 and inserting the following:

"7109. Review of criminal records.".

SEC. 4103. SUSPENSION AND REVOCATION OF LICENSES, CERTIFICATES OF REGISTRY, AND MERCHANT MARINERS' DOCUMENTS FOR ALCOHOL AND DRUG ABUSE.

(a) AVAILABILITY OF INFORMATION IN NATIONAL DRIVER REGISTER.–

(1) IN GENERAL.–Section 7702 of title 46, United States Code, is amended by adding at the end the following:

"(c)(1) The Secretary shall request a holder of a license, certificate of registry, or merchant mariner's document to make available to the Secretary, under section 206(b)(4) of the National Driver Register Act of 1982 (23 U.S.C. 401 note), all information contained in the National Driver Register related to an offense described in section 205(a)(3)(A) or (B) of that Act committed by the individual.

"(2) The Secretary shall require the testing of the holder of a license, certificate of registry, or merchant mariner's document for use of alcohol and dangerous drugs in violation of law or Federal regulation. The testing may include preemployment (with respect to dangerous

drugs only), periodic, random, reasonable cause, and post accident testing.

"(d)(1) The Secretary may temporarily, for not more than 45 days, suspend and take possession of the license, certificate of registry, or merchant mariner's document held by an individual if, when acting under the authority of that license, certificate, or document–

"(A) that individual performs a safety sensitive function on a vessel, as determined by the Secretary; and

"(B) there is probable cause to believe that the individual–

"(i) has performed the safety sensitive function in violation of law or Federal regulation regarding use of alcohol or a dangerous drug;

"(ii) has been convicted of an offense that would prevent the issuance or renewal of the license, certificate, or document; or

"(iii) within the 3-year period preceding the initiation of a suspension proceeding, has been convicted of an offense described in section 205(a)(3)(A) or (B) of the National Driver Register Act of 1982.

"(2) If a license, certificate, or document is temporarily suspended under this section, an expedited hearing under subsection (a) of this section shall be held within 30 days after the temporary suspension.".

(2) DEFINITION OF DANGEROUS DRUG.–(A) Section 2101 of title 46, United States Code, is amended by inserting after paragraph (8) the following new paragraph:

"(8a) 'dangerous drug' means a narcotic drug, a controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 802)).".

(B) Sections 7503(a) and 7704(a) of title 46, United States Code, are repealed.

(b) BASES FOR SUSPENSION OR REVOCATION.–Section 7703 of title 46, United States Code, is amended to read as follows:

"§ 7703. Bases for suspension or revocation

"A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder–

"(1) when acting under the authority of that license, certificate, or document–

"(A) has violated or fails to comply with this subtitle, a regulation prescribed under this subtitle, or any other law or regulation intended to promote marine safety or to protect navigable waters; or

"(B) has committed an act of incompetence, misconduct, or negligence;

"(2) is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document; or

"(3) within the 3-year period preceding the initiation of the suspension or revocation proceeding is convicted of an offense described in section 205(a)(3)(A) or (B) of the National Driver Register Act of 1982 (23 U.S.C. 401 note).".

(c) TERMINATION OF REVOCATION.–Section 7701(c) of title 46, United States Code, is amended to read as follows:

"(c) When a license, certificate of registry, or merchant mariner's document has been revoked under this chapter, the former holder may be issued a new license, certificate of registry, or merchant mariner's document only after–

"(1) the Secretary decides, under regulations prescribed by the Secretary, that the issuance is compatible with the requirement of good discipline and safety at sea; and

"(2) the former holder provides satisfactory proof that the bases for revocation are no longer valid.".

SEC. 4104. REMOVAL OF MASTER OR INDIVIDUAL IN CHARGE.

Section 8101 of title 46, United States Code, is amended by adding at the end the following:

"(i) When the 2 next most senior licensed officers on a vessel reasonably believe that the master or individual

in charge of the vessel is under the influence of alcohol or a dangerous drug and is incapable of commanding the vessel, the next most senior master, mate, or operator licensed under section 7101(c)(1) or (3) of this title shall–

"(1) temporarily relieve the master or individual in charge;

"(2) temporarily take command of the vessel;

"(3) in the case of a vessel required to have a log under chapter 113 of this title, immediately enter the details of the incident in the log; and

"(4) report those details to the Secretary–

"(A) by the most expeditious means available; and

"(B) in written form transmitted within 12 hours after the vessel arrives at its next port.".

SEC. 4105. ACCESS TO NATIONAL DRIVER REGISTER.

(a) ACCESS TO REGISTER.–Section 206(b) of the National Driver Register Act of 1982 (23 U.S.C. 401 note) is amended–

(1) by redesignating the second paragraph (5) (as added to the end of that section by section 4(b)(1) of the Rail Safety Improvement Act of 1988) as paragraph (6); and

(2) by adding at the end the following:

"(7)(A) Any individual who holds or who has applied for a license or certificate of registry under section 7101 of title 46, United States Code, or a merchant mariner's document under section 7302 of title 46, United States Code, may request the chief driver licensing official of a State to transmit to the Secretary of the department in which the Coast Guard is operating in accordance with subsection (a) information regarding the motor vehicle driving record of the individual.

"(B) The Secretary–

"(i) may receive information transmitted by the chief driver licensing official of a State pursuant to a request under subparagraph (A);

"(ii) shall make the information available to the individual for review and written comment before denying, suspending, or revoking the license, certificate of registry, or merchant mariner's document of the individual based on that information and before using that information in any action taken under chapter 77 of title 46, United States Code; and

"(iii) may not otherwise divulge or use that information, except for the purposes of section 7101, 7302, or 7703 of title 46, United States Code.

"(C) Information regarding the motor vehicle driving record of an individual may not be transmitted to the Secretary under this paragraph if the information was entered in the Register

more than 3 years before the date of the request for the information, unless the information relates to revocations or suspensions that are still in effect on the date of the request. Information submitted to the Register by States under the Act of July 14, 1960 (74 Stat. 526), or under this title shall be subject to access for the purpose of this paragraph during the transition to the Register described under section 203(c) of this title.".

(b) CONFORMING AMENDMENTS.–

(1) REVIEW OF INFORMATION RECEIVED FROM REGISTER.–Chapter 75 of title 46, United States Code, is amended by adding at the end the following:

"§ 7505. Review of information inNational Driver Register

"The Secretary shall make information received from the National Driver Register under section 206(b)(7) of the National Driver Register Act of 1982 (23 U.S.C. 401 note) available to an individual for review and written comment before denying, suspending, revoking, or taking any other action relating to a license, certificate of registry, or merchant mariner's document authorized to be issued for that individual under this part, based on that information.".

(2) PENALTY FOR NEGLIGENT OPERATION OF VESSEL.–Section 2302(c) of title 46, United States Code, is amended by striking "intoxicated" and inserting "under the influence of

alcohol, or a dangerous drug in violation of a law of the United States".

(c) CLERICAL AMENDMENT.–The analysis for chapter 75 of title 46, United States Code, is amended by adding at the end the following:

"7505. Review of information in National Driver Register.".

SEC. 4106. MANNING STANDARDS FOR FOREIGN TANK VESSELS.

(a) STANDARDS FOR FOREIGN TANK VESSELS.–Section 9101(a) of title 46, United States Code, is amended to read as follows:

"(a)(1) The Secretary shall evaluate the manning, training, qualification, and watchkeeping standards of a foreign country that issues documentation for any vessel to which chapter 37 of this title applies–

"(A) on a periodic basis; and

"(B) when the vessel is involved in a marine casualty required to be reported under section 6101(a)(4) or (5) of this title.

"(2) After each evaluation made under paragraph (1) of this subsection, the Secretary shall determine whether–

"(A) the foreign country has standards for licensing and certification of seamen that are at least equivalent to United States law or international standards accepted by the United States; and

"(B) those standards are being enforced.

"(3) If the Secretary determines under this subsection that a country has failed to maintain or enforce standards at least equivalent to United States law or international standards accepted by the United States, the Secretary shall prohibit vessels issued documentation by that country from entering the United States until the Secretary determines those standards have been established and are being enforced.

"(4) The Secretary may allow provisional entry of a vessel prohibited from entering the United States under paragraph (3) of this subsection if–

"(A) the owner or operator of the vessel establishes, to the satisfaction of the Secretary, that the vessel is not unsafe or a threat to the marine environment; or

"(B) the entry is necessary for the safety of the vessel or individuals on the vessel.".

(b) REPORTING MARINE CASUALTIES.–

(1) REPORTING REQUIREMENT.–Section 6101(a) of title 46, United States Code, is amended by adding at the end the following:

"(5) significant harm to the environment.".

(2) APPLICATION TO FOREIGN VESSELS.– Section 6101(d) of title 46, United States Code, is amended–

(A) by inserting "(1)" before "This part"; and

(B) by adding at the end the following:

"(2) This part applies, to the extent consistent with generally recognized principles of international law, to a foreign vessel constructed or adapted to carry, or that carries, oil in bulk as cargo or cargo residue involved in a marine casualty described under subsection (a)(4) or (5) in waters subject to the jurisdiction of the United States, including the Exclusive Economic Zone.".

(c) TECHNICAL AND CONFORMING AMENDMENTS.– Section 9(a) of the Ports and Waterways Safety Act (33 U.S.C. 1228(a)) is amended–

(1) in the matter preceding paragraph (1), by striking "section 4417a of the Revised Statutes, as amended," and inserting "chapter 37 of title 46, United States Code,";

(2) in paragraph (2), by striking "section 4417a of the Revised Statutes, as amended," and inserting "chapter 37 of title 46, United States Code,"; and

(3) in paragraph (5), by striking "section 4417a(11) of the Revised Statutes, as amended," and inserting "section 9101 of title 46, United States Code,".

SEC. 4107. VESSEL TRAFFIC SERVICE SYSTEMS.

(a) IN GENERAL.–Section 4(a) of the Ports and Waterways Safety Act (33 U.S.C. 1223(a)) is amended–

(1) by striking "Secretary may–" and inserting "Secretary–";

(2) in paragraph (1) by striking "establish, operate, and maintain" and inserting "may construct, operate, maintain, improve, or expand";

(3) in paragraph (2) by striking "require" and inserting "shall require appropriate";

(4) in paragraph (3) by inserting "may" before "require";

(5) in paragraph (4) by inserting "may" before "control"; and

(6) in paragraph (5) by inserting "may" before "require".

(b) DIRECTION OF VESSEL MOVEMENT.–

(1) STUDY.–The Secretary shall conduct a study–

(A) of whether the Secretary should be given additional authority to direct the movement of vessels on navigable waters and should exercise such authority; and

(B) to determine and prioritize the United States ports and channels that are in need

of new, expanded, or improved vessel traffic service systems, by evaluating–

(i) the nature, volume, and frequency of vessel traffic;

(ii) the risks of collisions, spills, and damages associated with that traffic;

(iii) the impact of installation, expansion, or improvement of a vessel traffic service system; and

(iv) all other relevant costs and data.

(2) REPORT.–Not later than 1 year after the date of the enactment of this Act, the Secretary shall submit to the Congress a report on the results of the study conducted under paragraph (1) and recommendations for implementing the results of that study.

SEC. 4108. GREAT LAKES PILOTAGE.

(a) INDIVIDUALS WHO MAY SERVE AS PILOT ON UNDESIGNATED GREAT LAKE WATERS.– Section 9302(b) of title 46, United States Code, is amended to read as follows:

"(b) A member of the complement of a vessel of the United States operating on register or of a vessel of Canada may serve as the pilot required on waters not designated by the President if the member is licensed under section 7101 of this title, or under equivalent

provisions of Canadian law, to direct the navigation of the vessel on the waters being navigated.".

(b) PENALTIES.–Section 9308 of title 46, United States Code, is amended in each of subsections (a), (b), and (c) by striking "$500" and inserting "no more than $10,000".

SEC. 4109. PERIODIC GAUGING OF PLATING THICKNESS OF COMMERCIAL VESSELS.

(46 U.S.C.A. § 3703 NOTE)

Not later than 1 year after the date of the enactment of this Act, the Secretary shall issue regulations for vessels constructed or adapted to carry, or that carry, oil in bulk as cargo or cargo residue–

(1) establishing minimum standards for plating thickness; and

(2) requiring, consistent with generally recognized principles of international law, periodic gauging of the plating thickness of all such vessels over 30 years old operating on the navigable waters or the waters of the exclusive economic zone.

SEC. 4110. OVERFILL AND TANK LEVEL OR PRESSURE MONITORING DEVICES.

(46 U.S.C.A. § 3703 NOTE)

(a) STANDARDS.–Not later than 1 year after the date of the enactment of this Act, the Secretary shall establish, by regulation, minimum standards for devices for warning persons of overfills and tank levels of oil in cargo tanks and devices for monitoring the pressure of oil cargo tanks.

(b) USE.–Not later than 1 year after the date of the enactment of this Act, the Secretary shall issue regulations establishing, consistent with generally recognized principles of international law, requirements concerning the use of–

(1) overfill devices, and

(2) tank level or pressure monitoring devices,

which are referred to in subsection (a) and which meet the standards established by the Secretary under subsection (a), on vessels constructed or adapted to carry, or that carry, oil in bulk as cargo or cargo residue on the navigable waters and the waters of the exclusive economic zone.

SEC. 4111. STUDY ON TANKER NAVIGATION SAFETY STANDARDS.

(46 U.S.C.A. § 3703 NOTE)

(a) IN GENERAL.–Not later than 1 year after the date of enactment of this Act, the Secretary shall initiate a study to determine whether existing laws and regulations are adequate to ensure the safe navigation of vessels transporting oil or hazardous substances in bulk on the navigable waters and the waters of the exclusive economic zone.

(b) CONTENT.–In conducting the study required under subsection (a), the Secretary shall–

(1) determine appropriate crew sizes on tankers;

(2) evaluate the adequacy of qualifications and training of crewmembers on tankers;

(3) evaluate the ability of crewmembers on tankers to take emergency actions to prevent or remove

a discharge of oil or a hazardous substance from their tankers;

(4) evaluate the adequacy of navigation equipment and systems on tankers (including sonar, electronic chart display, and satellite technology);

(5) evaluate and test electronic means of position-reporting and identification on tankers, consider the minimum standards suitable for equipment for that purpose, and determine whether to require that equipment on tankers;

(6) evaluate the adequacy of navigation procedures under different operating conditions, including such variables as speed, daylight, ice, tides, weather, and other conditions;

(7) evaluate whether areas of navigable waters and the exclusive economic zone should be designated as zones where the movement of tankers should be limited or prohibited;

(8) evaluate whether inspection standards are adequate;

(9) review and incorporate the results of past studies, including studies conducted by the Coast Guard and the Office of Technology Assessment;

(10) evaluate the use of computer simulator courses for training bridge officers and pilots of vessels transporting oil or hazardous substances on the navigable waters and waters of the exclusive economic zone, and determine the feasibility and practicality of mandating such training;

(11) evaluate the size, cargo capacity, and flag nation of tankers transporting oil or hazardous substances on the navigable waters and the waters of the exclusive economic zone–

(A) identifying changes occurring over the past 20 years in such size and cargo capacity and in vessel navigation and technology; and

(B) evaluating the extent to which the risks or difficulties associated with tanker navigation, vessel traffic control, accidents, oil spills, and the containment and cleanup of such spills are influenced by or related to an increase in tanker size and cargo capacity; and

(12) evaluate and test a program of remote alcohol testing for masters and pilots aboard tankers carrying significant quantities of oil.

(c) REPORT.–Not later than 2 years after the date of enactment of this Act, the Secretary shall transmit to the Congress a report on the results of the study conducted under subsection (a), including recommendations for implementing the results of that study.

SEC. 4112. DREDGE MODIFICATION STUDY.

(a) STUDY.–The Secretary of the Army shall conduct a study and demonstration to determine the feasibility of modifying dredges to make them usable in removing discharges of oil and hazardous substances.

(b) REPORT.–Not later than 1 year after the date of enactment of this Act, the Secretary of the Army shall submit to the Congress a report on the results of the study conducted under subsection (a) and recommendations for implementing the results of that study.

SEC. 4113. USE OF LINERS.

(a) STUDY.–The President shall conduct a study to determine whether liners or other secondary means of containment should be used to prevent leaking or to aid in leak detection at onshore facilities used for the bulk storage of oil and located near navigable waters.

(b) REPORT.–Not later than 1 year after the date of enactment of this Act, the President shall submit to the Congress a report on the results of the study conducted under subsection (a) and recommendations to implement the results of the study.

(c) IMPLEMENTATION.–Not later than 6 months after the date the report required under subsection (b) is submitted to the Congress, the President shall implement the recommendations contained in the report.

SEC. 4114. TANK VESSEL MANNING.

(a) RULEMAKING.–In order to protect life, property, and the environment, the Secretary shall initiate a rulemaking proceeding within 180 days after the date of the enactment of this Act to define the conditions under, and designate the waters upon, which tank vessels subject to section 3703 of title 46, United States Code, may operate in the navigable waters with the auto-pilot engaged or with an unattended engine room.

(b) WATCHES.–Section 8104 of title 46, United States Code, is amended by adding at the end the followingnew subsection:

"(n) On a tanker, a licensed individual or seaman may not be permitted to work more than 15 hours in any 24-hour period, or more than 36 hours in any 72-hour period, except in an emergency or a drill. In this subsection, 'work' includes any administrative duties associated with the vessel whether performed on board the vessel or onshore.".

(c) MANNING REQUIREMENT.–Section 8101(a) of title 46, United States Code, is amended–

(1) by striking "and" at the end of paragraph (1);

(2) by striking the period at the end of paragraph (2) and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(3) a tank vessel shall consider the navigation, cargo handling, and maintenance functions of that vessel for protection of life, property, and the environment.".

(d) STANDARDS.–Section 9102(a) of title 46, United States Code, is amended–

(1) by striking "and" at the end of paragraph (6);

(2) by striking the period at the end of paragraph (7) and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(8) instruction in vessel maintenance functions.".

(e) RECORDS.–Section 7502 of title 46, United States Code, is amended by striking "maintain records" and inserting "maintain computerized records".

SEC. 4115. ESTABLISHMENT OF DOUBLE HULL REQUIREMENT FOR TANK VESSELS.

(a) DOUBLE HULL REQUIREMENT.–Chapter 37 of title 46, United States Code, is amended by inserting after section 3703 the following new section:

"§ 3703a. Tank vessel construction standards

"(a) Except as otherwise provided in this section, a vessel to which this chapter applies shall be equipped with a double hull–

"(1) if it is constructed or adapted to carry, or carries, oil in bulk as cargo or cargo residue; and

"(2) when operating on the waters subject to the jurisdiction of the United States, including the Exclusive Economic Zone.

"(b) This section does not apply to–

"(1) a vessel used only to respond to a discharge of oil or a hazardous substance;

"(2) a vessel of less than 5,000 gross tons equipped with a double containment system determined by the Secretary to be as effective as a double hull for the prevention of a discharge of oil; or

"(3) before January 1, 2015–

"(A) a vessel unloading oil in bulk at a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.); or

"(B) a delivering vessel that is offloading in lightering activities–

"(i) within a lightering zone established under section 3715(b)(5) of this title; and

"(ii) more than 60 miles from the baseline from which the territorial sea of the United States is measured.

"(c)(1) In this subsection, the age of a vessel is determined from the later of the date on which the vessel–

"(A) is delivered after original construction;

"(B) is delivered after completion of a major conversion; or

"(C) had its appraised salvage value determined by the Coast Guard and is qualified for documentation under section 4136 of the Revised Statutes of the United States (46 App. U.S.C. 14).

"(2) A vessel of less than 5,000 gross tons for which a building contract or contract for major conversion was

placed before June 30, 1990, and that is delivered under that contract before January 1, 1994, and a vessel of less than 5,000 gross tons that had its appraised salvage value determined by the Coast Guard before June 30, 1990, and that qualifies for documentation under section 4136 of the Revised Statutes of the United States (46 App.U.S.C. 14) before January 1, 1994, may not operate in the navigable waters or the Exclusive Economic Zone of the United States after January 1, 2015, unless the vessel is equipped with a double hull or with a double containment system determined by the Secretary to be as effective as a double hull for the prevention of a discharge of oil.

"(3) A vessel for which a building contract or contract for major conversion was placed before June 30, 1990, and that is delivered under that contract before January 1, 1994, and a vessel that had its appraised salvage value determined by the Coast Guard before June 30, 1990, and that qualifies for documentation under section 4136 of the Revised Statutes of the United States (46 App.U.S.C. 14) before January 1, 1994, may not operate in the navigable waters or Exclusive Economic Zone of the United States unless equipped with a double hull–

"(A) in the case of a vessel of at least 5,000 gross tons but less than 15,000 gross tons–

"(i) after January 1, 1995, if the vessel is 40 years old or older and has a single hull, or is 45 years old or older and has a double bottom or double sides;

"(ii) after January 1, 1996, if the vessel is 39 years old or older and has a single hull, or is 44 years old or older and has a double bottom or double sides;

"(iii) after January 1, 1997, if the vessel is 38 years old or older and has a single hull, or is 43 years old or older and has a double bottom or double sides;

"(iv) after January 1, 1998, if the vessel is 37 years old or older and has a single hull, or is 42 years old or older and has a double bottom or double sides;

"(v) after January 1, 1999, if the vessel is 36 years old or older and has a single hull, or is 41 years old or older and has a double bottom or double sides;

"(vi) after January 1, 2000, if the vessel is 35 years old or older and has a single hull, or is 40 years old or older and has a double bottom or double sides; and

"(vii) after January 1, 2005, if the vessel is 25 years old or older and has a single hull, or is 30 years old or older and has a double bottom or double sides;

"(B) in the case of a vessel of at least 15,000 gross tons but less than 30,000 gross tons–

"(i) after January 1, 1995, if the vessel is 40 years old or older and has a single hull, or is 45 years old or older and has a double bottom or double sides;

"(ii) after January 1, 1996, if the vessel is 38 years old or older and has a single hull, or is 43 years old or older and has a double bottom or double sides;

"(iii) after January 1, 1997, if the vessel is 36 years old or older and has a single hull, or is 41 years old or older and has a double bottom or double sides;

"(iv) after January 1, 1998, if the vessel is 34 years old or older and has a single hull, or is 39 years old or older and has a double bottom or double sides;

"(v) after January 1, 1999, if the vessel is 32 years old or older and has a single hull, or 37 years old or older and has a double bottom or double sides;

"(vi) after January 1, 2000, if the vessel is 30 years old or older and has a single hull, or is 35 years old or older and has a double bottom or double sides;

"(vii) after January 1, 2001, if the vessel is 29 years old or older and has a single hull, or is 34 years old or older and has a double bottom or double sides;

"(viii) after January 1, 2002, if the vessel is 28 years old or older and has a single hull, or is 33 years old or older and has a double bottom or double sides;

"(ix) after January 1, 2003, if the vessel is 27 years old or older and has a single hull, or is 32 years old or older and has a double bottom or double sides;

"(x) after January 1, 2004, if the vessel is 26 years old or older and has a single hull, or is 31 years old or older and has a double bottom or double sides; and

"(xi) after January 1, 2005, if the vessel is 25 years old or older and has a single hull, or is 30 years old or older and has a double bottom or double sides; and

"(C) in the case of a vessel of at least 30,000 gross tons–

"(i) after January 1, 1995, if the vessel is 28 years old or older and has a single hull, or 33 years old or older and has a double bottom or double sides;

"(ii) after January 1, 1996, if the vessel is 27 years old or older and has a single hull, or is 32 years old or older and has a double bottom or double sides;

"(iii) after January 1, 1997, if the vessel is 26 years old or older and has a single hull, or is 31 years old or older and has a double bottom or double sides;

"(iv) after January 1, 1998, if the vessel is 25 years old or older and has a single hull, or is 30 years old or older and has a double bottom or double sides;

"(v) after January 1, 1999, if the vessel is 24 years old or older and has a single hull, or 29 years old or older and has a double bottom or double sides; and

"(vi) after January 1, 2000, if the vessel is 23 years old or older and has a single hull, or is 28 years old or older and has a double bottom or double sides.

"(4) Except as provided in subsection (b) of this section–

"(A) a vessel that has a single hull may not operate after January 1, 2010; and

"(B) a vessel that has a double bottom or double sides may not operate after January 1, 2015.".

(b) RULEMAKING.–The Secretary shall, within 12 months after the date of the enactment of this Act, complete a rulemaking proceeding and issue a final rule to require that

tank vessels over 5,000 gross tons affected by section 3703a of title 46, United States Code, as added by this section, comply until January 1, 2015, with structural and operational requirements that the Secretary determines will provide as substantial protection to the environment as is economically and technologically feasible.

(c) CLERICAL AMENDMENT.–The analysis for chapter 37 of title 46, United States Code, is amended by inserting after the item relating to section 3703 the following:

"3703a. Tank vessel construction standards.".

(d) LIGHTERING REQUIREMENTS.–Section 3715(a) of title 46, United States Code, is amended–

(1) in paragraph (1), by striking "; and" and inserting a semicolon;

(2) in paragraph (2), by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(3) the delivering and the receiving vessel had on board at the time of transfer, a certificate of financial responsibility as would have been required under section 1016 of the Oil Pollution Act of 1990, had the transfer taken place in a place subject to the jurisdiction of the United States;

"(4) the delivering and the receiving vessel had on board at the time of transfer, evidence that each vessel is operating in compliance with

section 311(j) of the Federal Water Pollution Control Act (33 U.S.C. 1321(j)); and

"(5) the delivering and the receiving vessel are operating in compliance with section 3703a of this title.".

(e) SECRETARIAL STUDIES.–

(1) OTHER REQUIREMENTS.–Not later than 6 months after the date of enactment of this Act, the Secretary shall determine, based on recommendations from the National Academy of Sciences or other qualified organizations, whether other structural and operational tank vessel requirements will provide protection to the marine environment equal to or greater than that provided by double hulls, and shall report to the Congress that determination and recommendations for legislative action.

(2) REVIEW AND ASSESSMENT.–The Secretary shall–

(A) periodically review recommendations from the National Academy of Sciences and other qualified organizations on methods for further increasing the environmental and operational safety of tank vessels;

(B) not later than 5 years after the date of enactment of this Act, assess the impact of this section on the safety of the marine environment and the economic viability and operational makeup of the maritime oil transportation industry; and

(C) report the results of the review and assessment to the Congress with recommendations for legislative or other action.

(f) VESSEL FINANCING.–Section 1104 of the Merchant Marine Act of 1936 (46 App.U.S.C. 1274) is amended–

(1) by striking "SEC. 1104." and inserting "SEC. 1104A."; and

(2) by inserting after section 1104A (as redesignated by paragraph (1)) the following:

"SEC. 1104B. (a) Notwithstanding the provisions of this title, except as provided in subsection (d) of this section, the Secretary, upon the terms the Secretary may prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest on an obligation which aids in financing and refinancing, including reimbursement to an obligor for expenditures previously made, of a contract for construction or reconstruction of a vessel or vessels owned by citizens of the United States which are designed and to be employed for commercial use in the coastwise or intercoastal trade or in foreign trade as defined in section 905 of this Act if–

"(1) the construction or reconstruction by an applicant is made necessary to replace vessels the continued operation of which is denied by virtue of the imposition of a statutorily mandated change in standards for the operation

of vessels, and where, as a matter of law, the applicant would otherwise be denied the right to continue operating vessels in the trades in which the applicant operated prior to the taking effect of the statutory or regulatory change;

"(2) the applicant is presently engaged in transporting cargoes in vessels of the type and class that will be constructed or reconstructed under this section, and agrees to employ vessels constructed or reconstructed under this section as replacements only for vessels made obsolete by changes in operating standards imposed by statute;

"(3) the capacity of the vessels to be constructed or reconstructed under this title will not increase the cargo carrying capacity of the vessels being replaced;

"(4) the Secretary has not made a determination that the market demand for the vessel over its useful life will diminish so as to make the granting of the guarantee fiduciarily imprudent; and

"(5) the Secretary has considered the provisions of section 1104A(d)(1)(A)(iii), (iv), and (v) of this title.

"(b) For the purposes of this section–

"(1) the maximum term for obligations guaranteed under this program may not exceed 25 years;

"(2) obligations guaranteed may not exceed 75 percent of the actual cost or depreciated actual cost to the applicant for the construction or reconstruction of the vessel; and

"(3) reconstruction cost obligations may not be guaranteed unless the vessel after reconstruction will have a useful life of at least 15 years.

"(c)(1) The Secretary shall by rule require that the applicant provide adequate security against default. The Secretary may, in addition to any fees assessed under section 1104A(e), establish a Vessel Replacement Guarantee Fund into which shall be paid by obligors under this section–

"(A) annual fees which may be an additional amount on the loan guarantee fee in section 1104A(e) not to exceed an additional 1 percent; or

"(B) fees based on the amount of the obligation versus the percentage of the obligor's fleet being replaced by vessels constructed or reconstructed under this section.

"(2) The Vessel Replacement Guarantee Fund shall be a subaccount in the Federal Ship Financing Fund, and shall–

"(A) be the depository for all moneys received by the Secretary under sections 1101 through 1107 of this title with respect to guarantee or commitments to guarantee made under this section;

"(B) not include investigation fees payable under section 1104A(f) which shall be paid to the Federal Ship Financing Fund; and

"(C) be the depository, whenever there shall be outstanding any notes or obligations issued by the Secretary under section 1105(d) with respect to the Vessel Replacement Guarantee Fund, for all moneys received by the Secretary under sections 1101 through 1107 from applicants under this section.

"(d) The program created by this section shall, in addition to the requirements of this section, be subject to the provisions of sections 1101 through 1103; 1104A(b)(1), (4), (5), (6); 1104A(e); 1104A(f); 1104A(h); and 1105 through 1107; except that the Federal Ship Financing Fund is not liable for any guarantees or commitments to guarantee issued under this section.".

SEC. 4116. PILOTAGE.

(a) PILOT REQUIRED.–Section 8502(g) of title 46, United States Code, is amended to read as follows:

"(g)(1) The Secretary shall designate by regulation the areas of the approaches to and waters of Prince William Sound, Alaska, if any, on which a vessel subject to this section is not required to be under the direction and control of a pilot licensed under section 7101 of this title.

"(2) In any area of Prince William Sound, Alaska, where a vessel subject to this section is required to be under the direction and control of a pilot licensed under section 7101 of this title, the pilot may not be a member of the crew of that vessel and shall be a pilot licensed by the State of Alaska who is operating under a Federal license, when the vessel is navigating waters between 60 <<degrees>> 49' North latitude and the Port of Valdez, Alaska.".

(b) SECOND PERSON REQUIRED.–Section 8502 of title 46, United States Code, is amended by adding at the end the following:

"(h) The Secretary shall designate waters on which tankers over 1,600 gross tons subject to this section shall have on the bridge a master or mate licensed to direct and control the vessel under section 7101(c)(1) of this title who is separate and distinct from the pilot required under subsection (a) of this section.".

(c) ESCORTS FOR CERTAIN TANKERS.–Not later than 6 months after the date of the enactment of this Act, the Secretary shall initiate issuance of regulations under section 3703(a)(3) of title 46, United States Code, to define those areas, including Prince William Sound, Alaska, and Rosario Strait and Puget Sound, Washington (including those portions of the Strait of Juan de Fuca east of Port Angeles, Haro Strait, and the Strait of Georgia subject to United States jurisdiction), on which single hulled tankers over 5,000 gross tons transporting oil in bulk shall be escorted by at least two towing vessels (as defined under section 2101 of title 46, United States Code) or other vessels considered appropriate by the Secretary.

(d) TANKER DEFINED.–In this section the term "tanker" has the same meaning the term has in section 2101 of title 46, United States Code.

SEC. 4117. MARITIME POLLUTION PREVENTION TRAINING PROGRAM STUDY.

(46 App. U.S.C.A. § 1295 NOTE)

The Secretary shall conduct a study to determine the feasibility of a Maritime Oil Pollution Prevention Training program to be carried out in cooperation with approved maritime training institutions. The study shall assess the costs and benefits of transferring suitable vessels to selected maritime training institutions, equipping the vessels for oil spill response, and training students in oil pollution response skills. The study shall be completed and transmitted to the Congress no later than one year after the date of the enactment of this Act.

SEC. 4118. VESSEL COMMUNICATION EQUIPMENT REGULATIONS.

The Secretary shall, not later than one year after the date of the enactment of this Act, issue regulations necessary to ensure that vessels subject to the Vessel Bridge-to-Bridge Radiotelephone Act of 1971 (33 U.S.C. 1203) are also equipped as necessary to–

(1) receive radio marine navigation safety warnings; and

(2) engage in radio communications on designated frequencies with the Coast Guard, and such other vessels and stations as may be specified by the Secretary.

Subtitle B–Removal

SEC. 4201. FEDERAL REMOVAL AUTHORITY.

(a) IN GENERAL.–Subsection (c) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321(c)) is amended to read as follows:

"(c) FEDERAL REMOVAL AUTHORITY.–

"(1) GENERAL REMOVAL REQUIREMENT.–(A) The President shall, in accordance with the National Contingency Plan and any appropriate Area Contingency Plan, ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or a hazardous substance–

"(i) into or on the navigable waters;

"(ii) on the adjoining shorelines to the navigable waters;

"(iii) into or on the waters of the exclusive economic zone; or

"(iv) that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

"(B) In carrying out this paragraph, the President may–

"(i) remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time;

"(ii) direct or monitor all Federal, State, and private actions to remove a discharge; and

"(iii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

"(2) DISCHARGE POSING SUBSTANTIAL THREAT TO PUBLIC HEALTH OR WELFARE.–(A) If a discharge, or a substantial threat of a discharge, of oil or a hazardous substance from a vessel, offshore facility, or onshore facility is of such a size or character as to be a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States), the President shall direct all Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge.

"(B) In carrying out this paragraph, the President may, without regard to any other provision of law governing contracting procedures or employment of personnel by the Federal Government–

"(i) remove or arrange for the removal of the discharge, or mitigate or prevent the substantial threat of the discharge; and

"(ii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

"(3) ACTIONS IN ACCORDANCE WITH NATIONAL CONTINGENCY PLAN.–(A) Each Federal agency, State, owner or operator, or other

person participating in efforts under this subsection shall act in accordance with the National Contingency Plan or as directed by the President.

"(B) An owner or operator participating in efforts under this subsection shall act in accordance with the National Contingency Plan and the applicable response plan required under subsection (j), or as directed by the President.

"(4) EXEMPTION FROM LIABILITY.–(A) A person is not liable for removal costs or damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President.

"(B) Subparagraph (A) does not apply–

"(i) to a responsible party;

"(ii) to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);

"(iii) with respect to personal injury or wrongful death; or

"(iv) if the person is grossly negligent or engages in willful misconduct.

"(C) A responsible party is liable for any removal costs and damages that another person is relieved of under subparagraph (A).

"(5) OBLIGATION AND LIABILITY OF OWNER OR OPERATOR NOT AFFECTED.–Nothing in this subsection affects–

"(A) the obligation of an owner or operator to respond immediately to a discharge, or the threat of a discharge, of oil; or

"(B) the liability of a responsible party under the Oil Pollution Act of 1990.

"(6) RESPONSIBLE PARTY DEFINED.–For purposes of this subsection, the term 'responsible party' has the meaning given that term under section 1001 of the Oil Pollution Act of 1990.".

(b) NATIONAL CONTINGENCY PLAN.–Subsection (d) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321(d)) is amended to read as follows:

"(d) NATIONAL CONTINGENCY PLAN.–

"(1) PREPARATION BY PRESIDENT.–The President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances pursuant to this section.

"(2) CONTENTS.–The National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to, the following:

"(A) Assignment of duties and responsibilities among Federal departments and agencies in coordination with

State and local agencies and port authorities including, but not limited to, water pollution control and conservation and trusteeship of natural resources (including conservation of fish and wildlife).

"(B) Identification, procurement, maintenance, and storage of equipment and supplies.

"(C) Establishment or designation of Coast Guard strike teams, consisting of–

"(i) personnel who shall be trained, prepared, and available to provide necessary services to carry out the National Contingency Plan;

"(ii) adequate oil and hazardous substance pollution control equipment and material; and

"(iii) a detailed oil and hazardous substance pollution and prevention plan, including measures to protect fisheries and wildlife.

"(D) A system of surveillance and notice designed to safeguard against as well as ensure earliest possible notice of discharges of oil and hazardous substances and imminent threats of such discharges to the appropriate State and Federal agencies.

"(E) Establishment of a national center to provide coordination and direction for operations in carrying out the Plan.

"(F) Procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances.

"(G) A schedule, prepared in cooperation with the States, identifying–

"(i) dispersants, other chemicals, and other spill mitigating devices and substances, if any, that may be used in carrying out the Plan,

"(ii) the waters in which such dispersants, other chemicals, and other spill mitigating devices and substances may be used, and

"(iii) the quantities of such dispersant, other chemicals, or other spill mitigating device or substance which can be used safely in such waters,

"which schedule shall provide in the case of any dispersant, chemical, spill mitigating device or substance, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants, other chemicals, and other spill mitigating devices and substances which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters.

"(H) A system whereby the State or States affected by a discharge of oil or hazardous substance may act where necessary to remove such discharge and such State or States may be reimbursed in accordance with the Oil Pollution Act of 1990, in the case of any discharge of oil from a vessel or facility, for the reasonable costs incurred for that removal, from the Oil Spill Liability Trust Fund.

"(I) Establishment of criteria and procedures to ensure immediate and effective Federal identification of, and

response to, a discharge, or the threat of a discharge, that results in a substantial threat to the public health or welfare of the United States, as required under subsection (c)(2).

"(J) Establishment of procedures and standards for removing a worst case discharge of oil, and for mitigating or preventing a substantial threat of such a discharge.

"(K) Designation of the Federal official who shall be the Federal On-Scene Coordinator for each area for which an Area Contingency Plan is required to be prepared under subsection (j).

"(L) Establishment of procedures for the coordination of activities of–

"(i) Coast Guard strike teams established under subparagraph (C);

"(ii) Federal On-Scene Coordinators designated under subparagraph (K);

"(iii) District Response Groups established under subsection (j); and

"(iv) Area Committees established under subsection (j).

"(M) A fish and wildlife response plan, developed in consultation with the United States Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, and other interested parties (including State fish and wildlife conservation officials), for the immediate and effective protection, rescue, and rehabilitation of, and the minimization of risk of

damage to, fish and wildlife resources and their habitat that are harmed or that may be jeopardized by a discharge.

"(3) REVISIONS AND AMENDMENTS.–The President may, from time to time, as the President deems advisable, revise or otherwise amend the National Contingency Plan.

"(4) ACTIONS IN ACCORDANCE WITH NATIONAL CONTINGENCY PLAN.–After publication of the National Contingency Plan, the removal of oil and hazardous substances and actions to minimize damage from oil and hazardous substance discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan.".

(b) DEFINITIONS.–Section 311(a) of the Federal Water Pollution Control Act (33 U.S.C. 1321(a)) is amended–

(1) in paragraph (8), by inserting "containment and" after "refers to"; and

(2) in paragraph (16) by striking the period at the end and inserting a semicolon;

(3) in paragraph (17)–

(A) by striking "Otherwise" and inserting "otherwise"; and

(B) by striking the period at the end and inserting a semicolon; and

(4) by adding at the end the following:

"(18) 'Area Committee' means an Area Committee established under subsection (j);

"(19) 'Area Contingency Plan' means an Area Contingency Plan prepared under subsection (j);

"(20) 'Coast Guard District Response Group' means a Coast Guard District Response Group established under subsection (j);

"(21) 'Federal On-Scene Coordinator' means a Federal On-Scene Coordinator designated in the National Contingency Plan;

"(22) 'National Contingency Plan' means the National Contingency Plan prepared and published under subsection (d);

"(23) 'National Response Unit' means the National Response Unit established under subsection (j); and

"(24) 'worst case discharge' means–

"(A) in the case of a vessel, a discharge in adverse weather conditions of its entire cargo; and

"(B) in the case of an offshore facility or onshore facility, the largest foreseeable discharge in adverse weather conditions.".

(c) REVISION OF NATIONAL CONTINGENCY PLAN.–Not later than one year after the date of the enactment of this Act, the President shall revise and republish the National Contingency Plan prepared under section 311(c)(2) of the

Federal Water Pollution Control Act (as in effect immediately before the date of the enactment of this Act) to implement the amendments made by this section and section 4202.

SEC. 4202. NATIONAL PLANNING AND RESPONSE SYSTEM.

(a) IN GENERAL.–Subsection (j) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321(j)) is amended–

(1) by striking "(j)" and inserting the following:

"(j) NATIONAL RESPONSE SYSTEM.–";

(2) by moving paragraph (1) so as to begin immediately below the heading for subsection (j) (as added by paragraph (1) of this subsection);

(3) by moving paragraph (1) two ems to the right, so the left margin of that paragraph is aligned with the left margin of paragraph (2) of that subsection (as added by paragraph (6) of this subsection);

(4) in paragraph (1) by striking "(1)" and inserting the following:

"(1) IN GENERAL.–";

(5) by striking paragraph (2); and

(6) by adding at the end the following:

"(2) NATIONAL RESPONSE UNIT.–The Secretary of the department in which the Coast Guard is operating shall establish a National

Response Unit at Elizabeth City, North Carolina. The Secretary, acting through the National Response Unit–

"(A) shall compile and maintain a comprehensive computer list of spill removal resources, personnel, and equipment that is available worldwide and within the areas designated by the President pursuant to paragraph (4), which shall be available to Federal and State agencies and the public;

"(B) shall provide technical assistance, equipment, and other resources requested by a Federal On-Scene Coordinator;

"(C) shall coordinate use of private and public personnel and equipment to remove a worst case discharge, and to mitigate or prevent a substantial threat of such a discharge, from a vessel, offshore facility, or onshore facility operating in or near an area designated by the President pursuant to paragraph (4);

"(D) may provide technical assistance in the preparation of Area Contingency Plans required under paragraph (4);

"(E) shall administer Coast Guard strike teams established under the National Contingency Plan;

"(F) shall maintain on file all Area Contingency Plans approved by the President under this subsection; and

"(G) shall review each of those plans that affects its responsibilities under this subsection.

"(3) COAST GUARD DISTRICT RESPONSE GROUPS.–(A) The Secretary of the department in which the Coast Guard is operating shall establish in each Coast Guard district a Coast Guard District Response Group.

"(B) Each Coast Guard District Response Group shall consist of–

"(i) the Coast Guard personnel and equipment, including firefighting equipment, of each port within the district;

"(ii) additional prepositioned equipment; and

"(iii) a district response advisory staff.

"(C) Coast Guard district response groups–

"(i) shall provide technical assistance, equipment, and other resources when required by a Federal On-Scene Coordinator;

"(ii) shall maintain all Coast Guard response equipment within its district;

"(iii) may provide technical assistance in the preparation of Area Contingency Plans required under paragraph (4); and

"(iv) shall review each of those plans that affect its area of geographic responsibility.

"(4) AREA COMMITTEES AND AREA CONTINGENCY PLANS.–(A) There is established for each area designated by the President an Area Committee comprised of members appointed by the President from qualified personnel of Federal, State, and local agencies.

"(B) Each Area Committee, under the direction of the Federal On-Scene Coordinator for its area, shall–

"(i) prepare for its area the Area Contingency Plan required under subparagraph (C);

"(ii) work with State and local officials to enhance the contingency planning of those officials and to assure preplanning of joint response efforts, including appropriate procedures for mechanical recovery, dispersal, shoreline cleanup, protection of sensitive environmental areas, and protection, rescue, and rehabilitation of fisheries and wildlife; and

"(iii) work with State and local officials to expedite decisions for the use of dispersants and other mitigating substances and devices.

"(C) Each Area Committee shall prepare and submit to the President for approval an Area Contingency Plan for its area. The Area Contingency Plan shall–

"(i) when implemented in conjunction with the National Contingency Plan, be adequate to remove a worst case discharge, and to mitigate

or prevent a substantial threat of such a discharge, from a vessel, offshore facility, or onshore facility operating in or near the area;

"(ii) describe the area covered by the plan, including the areas of special economic or environmental importance that might be damaged by a discharge;

"(iii) describe in detail the responsibilities of an owner or operator and of Federal, State, and local agencies in removing a discharge, and in mitigating or preventing a substantial threat of a discharge;

"(iv) list the equipment (including firefighting equipment), dispersants or other mitigating substances and devices, and personnel available to an owner or operator and Federal, State, and local agencies, to ensure an effective and immediate removal of a discharge, and to ensure mitigation or prevention of a substantial threat of a discharge;

"(v) describe the procedures to be followed for obtaining an expedited decision regarding the use of dispersants;

"(vi) describe in detail how the plan is integrated into other Area Contingency Plans and vessel, offshore facility, and onshore facility response plans approved under this subsection, and into operating procedures of the National Response Unit;

"(vii) include any other information the President requires; and

"(viii) be updated periodically by the Area Committee.

"(D) The President shall–

"(i) review and approve Area Contingency Plans under this paragraph; and

"(ii) periodically review Area Contingency Plans so approved.

"(5) TANK VESSEL AND FACILITY RESPONSE PLANS.–(A) The President shall issue regulations which require an owner or operator of a tank vessel or facility described in subparagraph (B) to prepare and submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance.

"(B) The tank vessels and facilities referred to in subparagraph (A) are the following:

"(i) A tank vessel, as defined under section 2101 of title 46, United States Code.

"(ii) An offshore facility.

"(iii) An onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters,

adjoining shorelines, or the exclusive economic zone.

"(C) A response plan required under this paragraph shall–

"(i) be consistent with the requirements of the National Contingency Plan and Area Contingency Plans;

"(ii) identify the qualified individual having full authority to implement removal actions, and require immediate communications between that individual and the appropriate Federal official and the persons providing personnel and equipment pursuant to clause (iii);

"(iii) identify, and ensure by contract or other means approved by the President the availability of, private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge;

"(iv) describe the training, equipment testing, periodic unannounced drills, and response actions of persons on the vessel or at the facility, to be carried out under the plan to ensure the safety of the vessel or facility and to mitigate or prevent the discharge, or the substantial threat of a discharge;

"(v) be updated periodically; and

"(vi) be resubmitted for approval of each significant change.

"(D) With respect to any response plan submitted under this paragraph for an onshore facility that, because of its location, could reasonably be expected to cause significant and substantial harm to the environment by discharging into or on the navigable waters or adjoining shorelines or the exclusive economic zone, and with respect to each response plan submitted under this paragraph for a tank vessel or offshore facility, the President shall–

"(i) promptly review such response plan;

"(ii) require amendments to any plan that does not meet the requirements of this paragraph;

"(iii) approve any plan that meets the requirements of this paragraph; and

"(iv) review each plan periodically thereafter.

"(E) A tank vessel, offshore facility, or onshore facility required to prepare a response plan under this subsection may not handle, store, or transport oil unless–

"(i) in the case of a tank vessel, offshore facility, or onshore facility for which a response plan is reviewed by the President under subparagraph (D), the plan has been approved by the President; and

"(ii) the vessel or facility is operating in compliance with the plan.

"(F) Notwithstanding subparagraph (E), the President may authorize a tank vessel, offshore facility, or onshore facility to operate without a response plan approved under this paragraph, until not later than 2 years after the date of the submission to the President of a plan for the tank vessel or facility, if the owner or operator certifies that the owner or operator has ensured by contract or other means approved by the President the availability of private personnel and equipment necessary to respond, to the maximum extent practicable, to a worst case discharge or a substantial threat of such a discharge.

"(G) The owner or operator of a tank vessel, offshore facility, or onshore facility may not claim as a defense to liability under title I of the Oil Pollution Act of 1990 that the owner or operator was acting in accordance with an approved response plan.

"(H) The Secretary shall maintain, in the Vessel Identification System established under chapter 125 of title 46, United States Code, the dates of approval and review of a response plan under this paragraph for each tank vessel that is a vessel of the United States.

"(6) EQUIPMENT REQUIREMENTS AND INSPECTION.–Not later than 2 years after the date of enactment of this section, the President shall require–

"(A) periodic inspection of containment booms, skimmers, vessels, and other major equipment used to remove discharges; and

"(B) vessels operating on navigable waters and carrying oil or a hazardous substance in bulk as cargo to carry appropriate removal equipment that employs the best technology economically feasible and that is compatible with the safe operation of the vessel.

"(7) AREA DRILLS.–The President shall periodically conduct drills of removal capability, without prior notice, in areas for which Area Contingency Plans are required under this subsection and under relevant tank vessel and facility response plans. The drills may include participation by Federal, State, and local agencies, the owners and operators of vessels and facilities in the area, and private industry. The President may publish annual reports on these drills, including assessments of the effectiveness of the plans and a list of amendments made to improve plans.

"(8) UNITED STATES GOVERNMENT NOT LIABLE.–The United States Government is not liable for any damages arising from its actions or omissions relating to any response plan required by this section.".

(b) IMPLEMENTATION.–

(1) AREA COMMITTEES AND CONTINGENCY PLANS.–(A) Not later than 6 months

after the date of the enactment of this Act, the President shall designate the areas for which Area Committees are established under section 311(j)(4) of the Federal Water Pollution Control Act, as amended by this Act. In designating such areas, the President shall ensure that all navigable waters, adjoining shorelines, and waters of the exclusive economic zone are subject to an Area Contingency Plan under that section.

(B) Not later than 18 months after the date of the enactment of this Act, each Area Committee established under that section shall submit to the President the Area Contingency Plan required under that section.

(C) Not later than 24 months after the date of the enactment of this Act, the President shall–

(i) promptly review each plan;

(ii) require amendments to any plan that does not meet the requirements of section 311(j)(4) of the Federal Water Pollution Control Act; and

(iii) approve each plan that meets the requirements of that section.

(2) NATIONAL RESPONSE UNIT.–Not later than one year after the date of the enactment of this Act, the Secretary of the department in which the Coast Guard is operating shall establish a National Response Unit in accordance with section 311(j)(2) of the Federal Water Pollution Control Act, as amended by this Act.

(3) COAST GUARD DISTRICT RESPONSE GROUPS.–Not later than 1 year after the date of the enactment of this Act, the Secretary of the department in which the Coast Guard is operating shall establish Coast Guard District Response Groups in accordance with section 311(j)(3) of the Federal Water Pollution Control Act, as amended by this Act.

(4) TANK VESSEL AND FACILITY RESPONSE PLANS; TRANSITION PROVISION; EFFECTIVE DATE OF PROHIBITION.–(A) Not later than 24 months after the date of the enactment of this Act, the President shall issue regulations for tank vessel and facility response plans under section 311(j)(5) of the Federal Water Pollution Control Act, as amended by this Act.

(B) During the period beginning 30 months after the date of the enactment of this paragraph and ending 36 months after that date of enactment, a tank vessel or facility for which a response plan is required to be prepared under section 311(j)(5) of the Federal Water Pollution Control Act, as amended by this Act, may not handle, store, or transport oil unless the owner or operator thereof has submitted such a plan to the President.

(C) Subparagraph (E) of section 311(j)(5) of the Federal Water Pollution Control Act, as amended by this Act, shall take effect 36 months after the date of the enactment of this Act.

(c) STATE LAW NOT PREEMPTED.–Section 311(o)(2) of the Federal Water Pollution Control Act (33

U.S.C. 1321(o)(2)) is amended by inserting before the period the following: ", or with respect to any removal activities related to such discharge".

. . . .

Subtitle C–Penalties and Miscellaneous

. . . .

SEC. 4302. OTHER PENALTIES.

(a) NEGLIGENT OPERATIONS.–Section 2302 of title 46, United States Code, is amended–

(1) in subsection (b) by striking "shall be fined not more than $5,000, imprisoned for not more than one year, or both.", and inserting "commits a class A misdemeanor."; and

(2) in subsection (c)–

(A) by striking ", shall be" in the matter preceding paragraph (1);

(B) by inserting "is" before "liable" in paragraph (1); and

(C) by amending paragraph (2) to read as follows:

"(2) commits a class A misdemeanor.".

(b) INSPECTIONS.–Section 3318 of title 46, United States Code, is amended–

(1) in subsection (b) by striking "shall be fined not more than $10,000, imprisoned for not more than 5 years, or both." and inserting "commits a class D felony.";

(2) in subsection (c) by striking "shall be fined not more than $5,000, imprisoned for not more than 5 years, or both." and inserting "commits a class D felony.";

(3) in subsection (d) by striking "shall be fined not more than $5,000, imprisoned for not more than 5 years, or both." and inserting "commits a class D felony.";

(4) in subsection (e) by striking "shall be fined not more than $10,000, imprisoned for not more than 2 years, or both." and inserting "commits a class A misdemeanor."; and

(5) in the matter preceding paragraph (1) of subsection (f) by striking "shall be fined not less than $1,000 but not more than $10,000, and imprisoned for not less than 2 years but not more than 5 years," and inserting "commits a class D felony.".

(c) CARRIAGE OF LIQUID BULK DANGEROUS CARGOES.–Section 3718 of title 46, United States Code, is amended–

(1) in subsection (b) by striking "shall be fined not more than $50,000, imprisoned for not more than 5 years, or both." and inserting "commits a class D felony."; and

(2) in subsection (c) by striking "shall be fined not more than $100,000, imprisoned for not more than 10 years, or both." and inserting "commits a class C felony.".

(d) LOAD LINES.–Section 5116 of title 46, United States Code, is amended–

(1) in subsection (d) by striking "shall be fined not more than $10,000, imprisoned for not more than one year, or both." and inserting "commits a class A misdemeanor."; and

(2) in subsection (e) by striking "shall be fined not more than $10,000, imprisoned for not more than 2 years, or both." and inserting "commits a class A misdemeanor.".

(e) COMPLEMENT OF INSPECTED VESSELS.–Section 8101 of title 46, United States Code, is amended–

(1) in subsection (e) by striking "$50" and inserting "$1,000";

(2) in subsection (f) by striking "$100, or, for a deficiency of a licensed individual, a penalty of $500." and inserting "$10,000."; and

(3) in subsection (g) by striking "$500." and inserting "$10,000.".

(f) WATCHES.–Section 8104 of title 46, United States Code, is amended–

(1) in subsection (i) by striking "$100." and inserting "$10,000."; and

(2) in subsection (j) by striking "$500." and inserting "$10,000.".

(g) COASTWISE PILOTAGE.–Section 8502 of title 46, United States Code, is amended–

(1) in subsection (e) by striking "$500." and inserting "$10,000."; and

(2) in subsection (f) by striking "$500." and inserting "$10,000.".

(h) FOREIGN COMMERCE PILOTAGE.–Section 8503(e) of title 46, United States Code, is amended by striking "shall be fined not more than $50,000, imprisoned for not more than five years, or both." and inserting "commits a class D felony.".

(i) CREW REQUIREMENTS.–Section 8702(e) of title 46, United States Code, is amended by striking "$500." and inserting "$10,000.".

(j) PORTS AND WATERWAYS SAFETY ACT.–Section 13(b) of the Port and Waterways Safety Act (33 U.S.C. 1232(b)) is amended–

(1) in paragraph (1) by striking "shall be fined not more than $50,000 for each violation or imprisoned for not more than five years, or both." and inserting "commits a class D felony."; and

(2) in paragraph (2) by striking "shall, in lieu of the penalties prescribed in paragraph (1), be fined not more than $100,000, or imprisoned for not more than

10 years, or both." and inserting "commits a class C felony.".

(k) VESSEL NAVIGATION.–Section 4 of the Act of April 28, 1908 (33 U.S.C. 1236) is amended–

(1) in subsection (b) by striking "$500." and inserting "$5,000.";

(2) in subsection (c) by striking "$500." and inserting "$5,000,"; and

(3) in subsection (d) by striking "$250." and inserting "$2,500.".

(l) INTERVENTION ON THE HIGH SEAS ACT.–Section 12(a) of the Intervention of the High Seas Act (33 U.S.C. 1481(a)) is amended–

(1) in the matter preceding paragraph (1) by striking "Any person who" and inserting "A person commits a class A misdemeanor if that person"; and

(2) in paragraph (3) by striking ", shall be finednot more than $10,000 or imprisoned not more than one year, or both".

(m) DEEPWATER PORT ACT OF 1974.–Section 15(a) of the Deepwater Port Act of 1974 (33 U.S.C. 1514(a)) is amended by striking "shall on conviction be fined not more than $25,000 for each day of violation or imprisoned for not more than 1 year, or both." and inserting "commits a class A misdemeanor for each day of violation.".

(n) ACT TO PREVENT POLLUTION FROM SHIPS.–Section 9(a) of the Act to Prevent Pollution from Ships (33

U.S.C. 1908(a)) is amended by striking "shall, for each violation, be fined not more than $50,000 or be imprisoned for not more than 5 years, or both." and inserting "commits a class D felony.".

. . . .

SEC. 4306. CIVIL ENFORCEMENT UNDER FEDERAL WATER POLLUTION CONTROL ACT.

Section 311(e) of the Federal Water Pollution Control Act (33 U.S.C. 1321) is amended to read as follows:

"(e) CIVIL ENFORCEMENT.–

"(1) ORDERS PROTECTING PUBLIC HEALTH.–In addition to any action taken by a State or local government, when the President determines that there may be an imminent and substantial threat to the public health or welfare of the United States, including fish, shellfish, and wildlife, public and private property, shorelines, beaches, habitat, and other living and nonliving natural resources under the jurisdiction or control of the United States, because of an actual or threatened discharge of oil or a hazardous substance from a vessel or facility in violation of subsection (b), the President may–

"(A) require the Attorney General to secure any relief from any person, including the owner or operator of the vessel or facility, as may be necessary to abate such endangerment; or

"(B) after notice to the affected State, take any other action under this section, including issuing

administrative orders, that may be necessary to protect the public health and welfare.

"(2) JURISDICTION OF DISTRICT COURTS.–The district courts of the United States shall have jurisdiction to grant any relief under this subsection that the public interest and the equities of the case may require.".

TITLE V–PRINCE WILLIAM SOUND PROVISIONS

. . . .

SEC. 5002. TERMINAL AND TANKER OVERSIGHT AND MONITORING.

(33 U.S.C.A. § 2732)

(a) SHORT TITLE AND FINDINGS.–

(1) SHORT TITLE.–This section may be cited as the "Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Act of 1990".

(2) FINDINGS.–The Congress finds that–

(A) the March 24, 1989, grounding and rupture of the fully loaded oil tanker, the EXXON VALDEZ, spilled 11 million gallons of crude oil in Prince William Sound, an environmentally sensitive area;

(B) many people believe that complacency on the part of the industry and government personnel responsible for monitoring the operation of the Valdez terminal and vessel traffic in Prince William Sound was

one of the contributing factors to the EXXON VALDEZ oil spill;

(C) one way to combat this complacency is to involve local citizens in the process of preparing, adopting, and revising oil spill contingency plans;

(D) a mechanism should be established which fosters the long-term partnership of industry, government, and local communities in overseeing compliance with environmental concerns in the operation of crude oil terminals;

(E) such a mechanism presently exists at the Sullom Voe terminal in the Shetland Islands and this terminal should serve as a model for others;

(F) because of the effective partnership that has developed at Sullom Voe, Sullom Voe is considered the safes terminal in Europe;

(G) the present system of regulation and oversight of crude oil terminals in the United States has degenerated into a process of continual mistrust and confrontation.

(H) only when local citizens are involved in the process will the trust develop that is necessary to change the present system from confrontation to consensus;

(I) a pilot program patterned after Sullom Voe should be established in Alaska to

further refine the concepts and relationships involved; and

(J) similar programs should eventually be established in other major crude oil terminals in the United States because the recent oil spills in Texas, Delaware, and Rhode Island indicate that the safe transportation of crude oil is a national problem.

(b) DEMONSTRATION PROGRAMS.–

(1) ESTABLISHMENT.–There are established 2 Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Demonstration Programs (hereinafter referred to as "Programs") to be carried out in the State of Alaska.

(2) ADVISORY FUNCTION.–The function of these Programs shall be advisory only.

(3) PURPOSE.–The Prince William Sound Program shall be responsible for environmental monitoring of the terminal facilities in Prince William Sound and the crude oil tankers operating in Prince William Sound. The Cook Inlet Program shall be responsible for environmental monitoring of the terminal facilities and crude oil tankers operating in Cook Inlet located South of the latitude at Point Possession and North of the latitude at Amatuli Island, including offshore facilities in Cook Inlet.

(4) SUITS BARRED.–No program, association, council, committee or other organization created by this section may sue any person or entity, public or private,

concerning any matter arising under this section except for the performance of contracts.

(c) OIL TERMINAL FACILITIES AND OIL TANKER OPERATIONS ASSOCIATION.–

(1) ESTABLISHMENT.–There is established an Oil Terminal Facilities and Oil Tanker Operations Association (hereinafter in this section referred to as the "Association") for each of the Programs established under subsection (b).

(2) MEMBERSHIP.–Each Association shall be comprised of 4 individuals as follows:

(A) One individual shall be designated by the owners and operators of the terminal facilities and shall represent those owners and operators.

(B) One individual shall be designated by the owners and operators of the crude oil tankers calling at the terminal facilities and shall represent those owners and operators.

(C) One individual shall be an employee of the State of Alaska, shall be designated by the Governor of the State of Alaska, and shall represent the State government.

(D) One individual shall be an employee of the Federal Government, shall be designated by the President, and shall represent the Federal Government.

(3) RESPONSIBILITIES.–Each Association shall be responsible for reviewing policies relating to the operation and maintenance of the oil terminal facilities and crude oil tankers which affect or may affect the environment in the vicinity of their respective terminals. Each Association shall provide a forum among the owners and operators of the terminal facilities, the owners and operators of crude oil tankers calling at those facilities, the United States, and the State of Alaska to discuss and to make recommendations concerning all permits, plans, and site-specific regulations governing the activities and actions of the terminal facilities which affect or may affect the environment in the vicinity of the terminal facilities and of crude oil tankers calling at those facilities.

(4) DESIGNATION OF EXISTING ORGANIZATION.–The Secretary may designate an existing nonprofit organization as an Association under this subsection if the organization is organized to meet the purposes of this section and consists of at least the individuals listed in paragraph (2).

(d) REGIONAL CITIZENS' ADVISORY COUNCILS.–

(1) MEMBERSHIP.–There is established a Regional Citizens' Advisory Council (hereinafter in this section referred to as the "Council") for each of the programs established by subsection (b).

(2) MEMBERSHIP.–Each Council shall be composed of voting members and nonvoting members, as follows:

(A) VOTING MEMBERS.–Voting members shall be Alaska residents and, except as provided in clause (vii) of this paragraph, shall be appointed by the Governor of the State of Alaska from a list of nominees provided by each of the following interests, with one representative appointed to represent each of the following interests, taking into consideration the need for regional balance on the Council:

(i) Local commercial fishing industry organizations, the members of which depend on the fisheries resources of the waters in the vicinity of the terminal facilities.

(ii) Aquaculture associations in the vicinity of the terminal facilities.

(iii) Alaska Native Corporations and other Alaska Native organizations the members of which reside in the vicinity of the terminal facilities.

(iv) Environmental organizations the members of which reside in the vicinity of the terminal facilities.

(v) Recreational organizations the members of which reside in or use the vicinity of the terminal facilities.

(vi) The Alaska State Chamber of Commerce, to represent the locally based tourist industry.

(vii)(I) For the Prince William Sound Terminal Facilities Council, one representative selected by each of the following municipalities: Cordova, Whittier, Seward, Valdez, Kodiak, the Kodiak Island Borough, and the Kenai Peninsula Borough.

(II) For the Cook Inlet Terminal Facilities Council, one representative selected by each of the following municipalities: Homer, Seldovia, Anchorage, Kenai, Kodiak, the Kodiak Island Borough, and the Kenai Peninsula Borough.

(B) NONVOTING MEMBERS.–One ex-officio, nonvoting representative shall be designated by, and represent, each of the following:

(i) The Environmental Protection Agency.

(ii) The Coast Guard.

(iii) The National Oceanic and Atmospheric Administration.

(iv) The United States Forest Service.

(v) The Bureau of Land Management.

(vi) The Alaska Department of Environmental Conservation.

(vii) The Alaska Department of Fish and Game.

(viii) The Alaska Department of Natural Resources.

(ix) The Division of Emergency Services, Alaska Department of Military and Veterans Affairs.

(3) TERMS.–

(A) DURATION OF COUNCILS.–The term of the Councils shall continue throughout the life of the operation of the Trans-Alaska Pipeline System and so long as oil is transported to or from Cook Inlet.

(B) THREE YEARS.–The voting members of each Council shall be appointed for a term of 3 years except as provided for in subparagraph (C).

(C) INITIAL APPOINTMENTS.–The terms of the first appointments shall be as follows:

(i) For the appointments by the Governor of the State of Alaska, one-third shall serve for 3 years, one-third shall serve for 2 years, and one-third shall serve for one year.

(ii) For the representatives of municipalities required by subsection (d)(2)(A)(vii), a drawing of lots among the appointees shall determine that one-third of that group serves for 3 years, one-third serves for 2 years, and the remainder serves for 1 year.

(4) SELF-GOVERNING.–Each Council shall elect its own chairperson, select its own staff, and make policies with regard to its internal operating procedures. After the initial organizational meeting called by the Secretary under subsection (i), each Council shall be self-governing.

(5) DUAL MEMBERSHIP AND CONFLICTS OF INTEREST PROHIBITED.–(A) No individual selected as a member of the Council shall serve on the Association.

(B) No individual selected as a voting member of the Council shall be engaged in any activity which might conflict with such individual carrying out his functions as a member thereof.

(6) DUTIES.–Each Council shall–

(A) provide advice and recommendations to the Association on policies, permits, and site-specific regulations relating to the operation and maintenance of terminal facilities and crude oil tankers which affect or may affect the environment in the vicinity of the terminal facilities;

(B) monitor through the committee established under subsection (e), the environmental impacts of the operation of the terminal facilities and crude oil tankers;

(C) monitor those aspects of terminal facilities' and crude oil tankers' operations and maintenance which affect or may affect the environment in the vicinity of the terminal facilities;

(D) review through the committee established under subsection (f), the adequacy of oil spill prevention and contingency plans for the terminal facilities and the adequacy of oil spill prevention and contingency plans for crude oil tankers, operating in Prince William Sound or in Cook Inlet;

(E) provide advice and recommendations to the Association on port operations, policies and practices;

(F) recommend to the Association–

(i) standards and stipulations for permits and site-specific regulations intended to minimize the impact of the terminal facilities' and crude oil tankers' operations in the vicinity of the terminal facilities;

(ii) modifications of terminal facility operations and maintenance intended to minimize the risk and mitigate the impact of terminal facilities,

operations in the vicinity of the terminal facilities and to minimize the risk of oil spills;

(iii) modifications of crude oil tanker operations and maintenance in Prince William Sound and Cook Inlet intended to minimize the risk and mitigate the impact of oil spills; and

(iv) modifications to the oil spill prevention and contingency plans for terminal facilities and for crude oil tankers in Prince William Sound and Cook Inlet intended to enhance the ability to prevent and respond to an oil spill; and

(G) create additional committees of the Council as necessary to carry out the above functions, including a scientific and technical advisory committee to the Prince William Sound Council.

(7) NO ESTOPPEL.–No Council shall be held liable under State or Federal law for costs or damages as a result of rendering advice under this section. Nor shall any advice given by a voting member of a Council, or program representative or agent, be grounds for estopping the interests represented by the voting Council members from seeking damages or other appropriate relief.

(8) SCIENTIFIC WORK.–In carrying out its research, development and monitoring functions, each Council is authorized to conduct its own scientific

research and shall review the scientific work undertaken by or on behalf of the terminal operators or crude oil tanker operators as a result of a legal requirement to undertake that work. Each Council shall also review the relevant scientific work undertaken by or on behalf of any government entity relating to the terminal facilities or crude oil tankers. To the extent possible, to avoid unnecessary duplication, each Council shall coordinate its independent scientific work with the scientific work performed by or on behalf of the terminal operators and with the scientific work performed by or on behalf of the operators of the crude oil tankers.

(e) COMMITTEE FOR TERMINAL AND OIL TANKER OPERATIONS AND ENVIRONMENTAL MONITORING.–

(1) MONITORING COMMITTEE.–Each Council shall establish standing Terminal and Oil Tanker Operations and Environmental Monitoring Committee (hereinafter in this section referred to as the "Monitoring Committee") to devise and manage a comprehensive program of monitoring the environmental impacts of the operations of terminal facilities and of crude oil tankers while operating in Prince William Sound and Cook Inlet. The membership of the Monitoring Committee shall be made up of members of the Council, citizens, and recognized scientific experts selected by the Council.

(2) DUTIES.–In fulfilling its responsibilities, the Monitoring Committee shall–

(A) advise the Council on a monitoring strategy that will permit early detection of

environmental impacts of terminal facility operations and crude oil tanker operations while in Prince William Sound and Cook Inlet;

(B) develop monitoring programs and make recommendations to the Council on the implementation of those programs;

(C) at its discretion, select and contract with universities and other scientific institutions to carry out specific monitoring projects authorized by the Council pursuant to an approved monitoring strategy;

(D) complete any other tasks assigned by the Council; and

(E) provide written reports to the Council which interpret and assess the results of all monitoring programs.

(f) COMMITTEE FOR OIL SPILL PREVENTION, SAFETY, AND EMERGENCY RESPONSE.–

(1) TECHNICAL OIL SPILL COMMITTEE.–Each Council shall establish a standing technical committee (hereinafter referred to as "Oil Spill Committee") to review and assess measures designed to prevent oil spills and the planning and preparedness for responding to, containing, cleaning up, and mitigating impacts of oil spills. The membership of the Oil Spill Committee shall be made up of members of the Council, citizens, and recognized technical experts selected by the Council.

(2) DUTIES.–In fulfilling its responsibilities, the Oil Spill Committee shall–

(A) periodically review the respective oil spill prevention and contingency plans for the terminal facilities and for the crude oil tankers while in Prince William Sound or Cook Inlet, in light of new technological developments and changed circumstances;

(B) monitor periodic drills and testing of the oil spill contingency plans for the terminal facilities and for crude oil tankers while in Prince William Sound and Cook Inlet;

(C) study wind and water currents and other environmental factors in the vicinity of the terminal facilities which may affect the ability to prevent, respond to, contain, and clean up an oil spill;

(D) identify highly sensitive areas which may require specific protective measures in the event of a spill in Prince William Sound or Cook Inlet;

(E) monitor developments in oil spill prevention, containment, response, and cleanup technology;

(F) periodically review port organization, operations, incidents, and the adequacy and maintenance of vessel traffic service systems designed to assure safe transit of crude oil tankers pertinent to terminal operations;

(G) periodically review the standards for tankers bound for, loading at, exiting from, or otherwise using the terminal facilities;

(H) complete any other tasks assigned by the Council; and

(I) provide written reports to the Council outlining its findings and recommendations.

(g) AGENCY COOPERATION.–On and after the expiration of the 180-day period following the date of the enactment of this section, each Federal department, agency, or other instrumentality shall, with respect to all permits, site-specific regulations, and other matters governing the activities and actions of the terminal facilities which affect or may affect the vicinity of the terminal facilities, consult with the appropriate Council prior to taking substantive action with respect to the permit, site-specific regulation, or other matter. This consultation shall be carried out with a view to enabling the appropriate Association and Council to review the permit, site- specific regulation, or other matters and make appropriate recommendations regarding operations, policy or agency actions. Prior consultation shall not be required if an authorized Federal agency representative reasonably believes that an emergency exists requiring actionwithout delay.

(h) RECOMMENDATIONS OF THE COUNCIL.–In the event that the Association does not adopt, or significantly modifies before adoption, any recommendation of the Council made pursuant to the authority granted to the Council in subsection (d), the Association shall provide to the Council, in writing, within 5 days of its decision, notice of its decision and a written statement of reasons for its rejection or significant modification of the recommendation.

(i) ADMINISTRATIVE ACTIONS.–Appointments, designations, and selections of individuals to serve as members of the Associations and Councils under this section shall be submitted to the Secretary prior to the expiration of the 120-day period following the date of the enactment of this section. On or before the expiration of the 180-day period following that date of enactment of this section, the Secretary shall call an initial meeting of each Association and Council for organizational purposes.

(j) LOCATION AND COMPENSATION.–

(1) LOCATION.–Each Association and Council established by this section shall be located in the State of Alaska.

(2) COMPENSATION. No member of an Association or Council shall be compensated for the member's services as a member of the Association or Council, but shall be allowed travel expenses, including per diem in lieu of subsistence, at a rate established by the Association or Council not to exceed the rates authorized for employees of agencies under sections 5702 and 5703 of title 5, United States Code. However, each Council may enter into contracts to provide compensation and expenses to members of the committees created under subsections (d), (e), and (f).

(k) FUNDING.–

(1) REQUIREMENT.–Approval of the contingency plans required of owners and operators of the Cook Inlet and Prince William Sound terminal facilities and crude oil tankers while operating in Alaskan waters in commerce with those terminal

facilities shall be effective only so long as the respective Association and Council for a facility are funded pursuant to paragraph (2).

(2) PRINCE WILLIAM SOUND PROGRAM.–The owners or operators of terminal facilities or crude oil tankers operating in Prince William Sound shall provide, on an annual basis, an aggregate amount of not more than $2,000,000, as determined by the Secretary. Such amount–

(A) shall provide for the establishment and operation on the environmental oversight and monitoring program in Prince William Sound;

(B) shall be adjusted annually by the Anchorage Consumer Price Index; and

(C) may be adjusted periodically upon the mutual consent of the owners or operators of terminal facilities or crude oil tankers operating in Prince William Sound and the Prince William Sound terminal facilities Council.

(3) Cook inlet program.–The owners or operators of terminal facilities, offshore facilities, or crude oil tankers operating in Cook Inlet shall provide, on an annual basis, an aggregate amount of not more than $1,000,000, as determined by the Secretary. Such amount–

(A) shall provide for the establishment and operation of the environmental oversight and monitoring program in Cook Inlet;

(B) shall be adjusted annually by the Anchorage Consumer Price Index; and

(C) may be adjusted periodically upon the mutual consent of the owners or operators of terminal facilities, offshore facilities, or crude oil tankers operating in Cook Inlet and the Cook Inlet Council.

(l) Reports.–

(1) Associations and councils.–Prior to the expiration of the 36-month period following the date of the enactment of this section, each Association and Council established by this section shall report to the President and the Congress concerning its activities under this section, together with its recommendations.

(2) GAO.–Prior to the expiration of the 36-month period following the date of the enactment of this section, the General Accounting Office shall report to the President and the Congress as to the handling of funds, including donated funds, by the entities carrying out the programs under this section, and the effectiveness of the demonstration programs carried out under this section, together with its recommendations.

(m) Definitions.–As used in this section, the term–

(1) "terminal facilities" means–

(A) in the case of the Prince William Sound Program, the entire oil terminal complex located in Valdez, Alaska, consisting of approximately 1,000 acres including all buildings, docks (except docks owned by the

City of Valdez if those docks are not used for loading of crude oil), pipes, piping, roads, ponds, tanks, crude oil tankers only while at the terminal dock, tanker escorts owned or operated by the operator of the terminal, vehicles, and other facilities associated with, and necessary for, assisting tanker movement of crude oil into and out of the oil terminal complex; and

(B) in the case of the Cook Inlet Program, the entire oil terminal complex including all buildings, docks, pipes, piping, roads, ponds, tanks, vessels, vehicles, crude oil tankers only while at the terminal dock, tanker escorts owned or operated by the operator of the terminal, emergency spill response vessels owned or operated by the operator of the terminal, and other facilities associated with, and necessary for, assisting tanker movement of crude oil into and out of the oil terminal complex;

(2) "crude oil tanker" means a tanker (as that term is defined under section 2101 of title 46, United States Code)–

(A) in the case of the Prince William Sound Program, calling at the terminal facilities for the purpose of receiving and transporting oil to refineries, operating north of Middleston Island and bound for or exiting from Prince William Sound; and

(B) in the case of the Cook Inlet Program, calling at the terminal facilities for the purpose of receiving and transporting oil to

refineries and operating in Cook Inlet and the Gulf of Alaska north of Amatuli Island, including tankers transiting to Cook Inlet from Prince William Sound;

(3) "vicinity of the terminal facilities" means that geographical area surrounding the environment of terminal facilities which is directly affected or may be directly affected by the operation of the terminal facilities; and

(4) "Secretary" means the Secretary of Transportation.

(n) SAVINGS CLAUSE.–

(1) REGULATORY AUTHORITY.–Nothing in this section shall be construed as modifying, repealing, superseding, or preempting any municipal, State or Federal law or regulation, or in any way affecting litigation arising from oil spills or the rights and responsibilities of the United States or the State of Alaska, or municipalities thereof, to preserve and protect the environment through regulation of land, air, and water uses, of safety, and of related development. The monitoring provided for by this section shall be designed to help assure compliance with applicable laws and regulations and shall only extend to activities–

(A) that would affect or have the potential to affect the vicinity of the terminal facilities and the area of crude oil tanker operations included in the Programs; and

(B) are subject to the United States or State of Alaska, or municipality thereof, law, regulation, or other legal requirement.

(2) RECOMMENDATIONS.–This subsection is not intended to prevent the Association or Council from recommending to appropriate authorities that existing legal requirements should be modified or that new legal requirements should be adopted.

(o) ALTERNATIVE VOLUNTARY ADVISORY GROUP IN LIEU OF COUNCIL.–The requirements of subsections (c) through (l), as such subsections apply respectively to the Prince William Sound Program and the Cook Inlet Program, are deemed to have been satisfied so long as the following conditions are met:

(1) PRINCE WILLIAM SOUND.–With respect to the Prince William Sound Program, the Alyeska Pipeline Service Company or any of its owner companies enters into a contract for the duration of the operation of the Trans-Alaska Pipeline System with the Alyeska Citizens Advisory Committee in existence on the date of enactment of this section, or a successor organization, to fund that Committee or organization on an annual basis in the amount provided for by subsection (k)(2)(A) and the President annually certifies that the Committee or organization fosters the general goals and purposes of this section and is broadly representative of the communities and interests in the vicinity of the terminal facilities and Prince William Sound.

(2) COOK INLET.–With respect to the Cook Inlet Program, the terminal facilities, offshore facilities, or crude oil tanker owners and operators enter into a

contract with a voluntary advisory organization to fund that organization on an annual basis and the President annually certifies that the organization fosters the general goals and purposes of this section and is broadly representative of the communities and interests in the vicinity of the terminal facilities and Cook Inlet.

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TITLE VI–MISCELLANEOUS

SEC. 6001. SAVINGS PROVISIONS.

(33 U.S.C.A. § 2751)

(a) CROSS-REFERENCES.–A reference to a law replaced by this Act, including a reference in a regulation, order, or other law, is deemed to refer to the corresponding provision of this Act.

(b) CONTINUATION OF REGULATIONS.–An order, rule, or regulation in effect under a law replaced by this Act continues in effect under the corresponding provision of this Act until repealed, amended, or superseded.

(c) RULE OF CONSTRUCTION.–An inference of legislative construction shall not be drawn by reason of the caption or catch line of a provision enacted by this Act.

(d) ACTIONS AND RIGHTS.–Nothing in this Act shall apply to any rights and duties that matured, penalties that were incurred, and proceedings that were begun before the date of enactment of this Act, except as provided by this section, and shall be adjudicated pursuant to the law applicable on the date prior to the date of the enactment of this Act.

(e) ADMIRALTY AND MARITIME LAW.–Except as otherwise provided in this Act, this Act does not affect–

(1) admiralty and maritime law; or

(2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

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TITLE VII–OIL POLLUTION RESEARCH AND DEVELOPMENT PROGRAM

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TITLE VIII–TRANS-ALASKA PIPELINE SYSTEM

SEC. 8001. SHORT TITLE.

(43 U.S.C.A. § 1651 NOTE)

This title may be cited as the "Trans-Alaska Pipeline System Reform Act of 1990".

Subtitle A–Improvements to Trans-Alaska Pipeline System

. . . .

Subtitle B–Penalties

SEC. 8201. AUTHORITY OF THE SECRETARY OF THE INTERIOR TO IMPOSE PENALTIES ON OUTER CONTINENTAL SHELF FACILITIES.

Section 24(b) of the Outer Continental Shelf Lands Act (43 U.S.C. 1350(b)) is amended–

(1) by striking out "If any" and inserting in lieu thereof "(1) Except as provided in paragraph (2), if any";

(2) by striking out "$10,000" and inserting in lieu thereof "$20,000";

(3) by adding at the end of paragraph (1) the following new sentence: "The Secretary shall, by regulation at least every 3 years, adjust the penalty specified in this paragraph to reflect any increases in the Consumer Price Index (all items, United States city average) as prepared by the Department of Labor."; and

(4) by adding at the end the following new paragraph:

"(2) If a failure described in paragraph (1) constitutes or constituted a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, any mineral deposit, or the marine, coastal, or human environment, a civil penalty may be assessed without regard to the requirement of

expiration of a period allowed for corrective action.".

SEC. 8202. TRANS-ALASKA PIPELINE SYSTEM CIVIL PENALTIES.

The Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.) is amended by adding at the end thereof the following new section:

"CIVIL PENALTIES

"SEC. 207. (a) PENALTY.–Except as provided in subsection (c)(4), the Secretary of the Interior may assess and collect a civil penalty under this section with respect to any discharge of oil–

"(1) in transit from fields or reservoirs supplying oil to the trans-Alaska pipeline; or

"(2) during transportation through the trans-Alaska pipeline or handling at the terminal facilities, that causes damage to, or threatens to damage, natural resources or public or private property.

"(b) PERSONS LIABLE.–In addition to the person causing or permitting the discharge, the owner or owners of the oil at the time the discharge occurs shall be jointly, severally, and strictly liable for the full amount of penalties assessed pursuant to this section, except that the United States and the several States, and political subdivisions thereof, shall not be liable under this section.

"(c) AMOUNT.–(1) The amount of the civil penalty shall not exceed $1,000 per barrel of oil discharged.

"(2) In determining the amount of civil penalty under this section, the Secretary shall consider the seriousness of the damages from the discharge, the cause of the discharge, any history of prior violations of applicable rules and laws, and the degree of success of any efforts by the violator to minimize or mitigate the effects of such discharge.

"(3) The Secretary may reduce or waive the penalty imposed under this section if the discharge was solely caused by an act of war, act of God, or third party action beyond the control of the persons liable under this section.

"(4) No civil penalty assessed by the Secretary pursuant to this section shall be in addition to a penalty assessed pursuant to section 311(b) of the Federal Water Pollution Control Act (33 U.S.C. 1321(b)).

"(d) PROCEDURES.–A civil penalty may be assessed and collected under this section only after notice and opportunity for a hearing on the record in accordance with section 554 of title 5, United States Code. In any proceeding for the assessment of a civil penalty under this section, the Secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents and may promulgate rules for discovery procedures. Any person who requested a hearing with respect to a civil penalty under this subsection and who is aggrieved by an order assessing the civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia circuit or for any other circuit in which such person resides or transacts business. Such a petition

may only be filed within the 30-day period beginning on the date the order making such assessment was issued.

"(e) STATE LAW.–(1) Nothing in this section shall be construed or interpreted as preempting any State or political subdivision thereof from imposing any additional liability or requirements with respect to the discharge, or threat of discharge, of oil or other pollution by oil.

"(2) Nothing in this section shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to discharges of oil.".

. . . .

TITLE IX–AMENDMENTS TO OIL SPILL LIABILITY TRUST FUND, ETC.

SEC. 9001. AMENDMENTS TO OIL SPILL LIABILITY TRUST FUND.

(a) TRANSFERS TO TRUST FUND.–Subsection (b) of section 9509 of the Internal Revenue Code of 1986 is amended by striking all that follows paragraph (1) and inserting the following:

"(2) amounts recovered under the Oil Pollution Act of 1990 for damages to natural resources which are required to be deposited in the Fund under section 1006(f) of such Act,

"(3) amounts recovered by such Trust Fund under section 1015 of such Act,

"(4) amounts required to be transferred by such Act from the revolving fund established under section 311(k) of the Federal Water Pollution Control Act,

"(5) amounts required to be transferred by the Oil Pollution Act of 1990 from the Deepwater Port Liability Fund established under section 18(f) of the Deepwater Port Act of 1974,

"(6) amounts required to be transferred by the Oil Pollution Act of 1990 from the Offshore Oil Pollution Compensation Fund established under section 302 of the Outer Continental Shelf Lands Act Amendments of 1978,

"(7) amounts required to be transferred by the Oil Pollution Act of 1990 from the Trans-Alaska Pipeline Liability Fund established under section 204 of the Trans-Alaska Pipeline Authorization Act, and

"(8) any penalty paid pursuant to section 311 of the Federal Water Pollution Control Act, section 309(c) of such Act (as a result of violations of such section 311), the Deepwater Port Act of 1974, or section 207 of the Trans- Alaska Pipeline Authorization Act."

(b) EXPENDITURES FROM TRUST FUND.–Paragraph (1) of section 9509(c) of such Code is amended to read as follows:

"(1) EXPENDITURE PURPOSES.–Amounts in the Oil Spill Liability Trust Fund shall be available, as provided in appropriation Acts or section 6002(b) of the Oil Pollution Act of 1990, only for purposes of making expenditures–

"(A) for the payment of removal costs and other costs, expenses, claims, and damages referred to in section 1012 of such Act,

"(B) to carry out sections 5 and 7 of the Intervention on the High Seas Act relating to oil pollution or the substantial threat of oil pollution,

"(C) for the payment of liabilities incurred by the revolving fund established by section 311(k) of the Federal Water Pollution Control Act,

"(D) to carry out subsections (b), (c), (d), (j), and (l) of section 311 of the Federal Water Pollution Control Act with respect to prevention, removal, and enforcement related to oil discharges (as defined in such section),

"(E) for the payment of liabilities incurred by the Deepwater Port Liability Fund, and

"(F) for the payment of liabilities incurred by the Offshore Oil Pollution Compensation Fund."

(c) INCREASE IN EXPENDITURES PERMITTED PER INCIDENT.–Subparagraph (A) of section 9509(c)(2) of such Code is amended–

(1) by striking "$500,000,000" each place it appears and inserting "$1,000,000,000", and

(2) by striking "$250,000,000" and inserting "$500,000,000".

(d) INCREASE IN BORROWING AUTHORITY.–

(1) INCREASE IN BORROWING PERMITTED.–Paragraph (2) of section 9509(d) of such Code is amended by striking "$500,000,000" and inserting "$1,000,000,000".

(2) CHANGE IN FINAL REPAYMENT DATE.–Subparagraph (B) of section 9509(d)(3) of such Code is amended by striking "December 31, 1991" and inserting "December 31, 1994".

(e) OTHER CHANGES.–

(1) Paragraph (2) of section 9509(e) of such Code is amended by striking "Comprehensive Oil Pollution Liability and Compensation Act" and inserting "Oil Pollution Act of 1990".

(2) Subparagraph (B) of section 9509(c)(2) of such Code is amended by striking "described in paragraph (1)(A)(i)" and inserting "of removal costs".

(3) Subsection (f) of section 9509 of such Code is amended to read as follows:

> "(f) REFERENCES TO OIL POLLUTION ACT OF 1990.–Any reference in this section to the Oil Pollution Act of 1990 or any other Act referred to in a subparagraph of subsection (c)(1) shall be treated as a reference to such Act as in effect on the date of the enactment of this subsection."

. . . .

Supreme Court, U.S.
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No. 98-1701

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The Ninth Circuit held in this case that state rules governing the operation of oil tankers and the staffing, training and qualifications of their officers and crew are categorically *not* preempted, even if they conflict with Coast Guard regulations. As we explain in the petition, that holding cannot be reconciled with this Court's decision in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), or with the text and structure of the Ports and Waterways Safety Act of 1972 (PWSA) and the Oil Pollution Act of 1990 (OPA). See Pet. 14-24. We also explain that the decision below gravely impairs the longstanding authority of the Coast Guard to establish uniform national standards for vessels in interstate and foreign commerce, undermines the United States' binding commitments to the existing international regime of shipping regulation, and threatens the ability of the United States to speak with one voice in the future development of international standards to promote vessel safety and protect the marine environment. See Pet. 24-30.

Respondents do not dispute that the question presented is important, nor do they take issue with our submission regarding the international repercussions of the decision below, which are evidenced by the diplomatic protests of 14 of this Nation's major maritime trading partners. See Pet. 26-27. Rather, respondents oppose certiorari principally on the

grounds that the decision below is correct and that Congress has authorized the states unilaterally to dismantle the regime of national and international tanker regulation in the manner approved by the court of appeals. That submission is without merit.

1. The decision below squarely conflicts with this Court's decision in *Ray*. There, the Court held that Title II of the PWSA regulates the field of tanker design, equipment, and construction, and that any state law on those subjects is therefore automatically preempted. 435 U.S. at 160-168. The Court further held that, although Title I of the PWSA does not similarly preempt the entire field of the operation of vessels in local waters, a state law within that field *is* preempted if the Coast Guard has promulgated a regulation on the same subject. *Id.* at 171-178; see Pet. 15-16.

Respondents Natural Resources Defense Council, et al. (NRDC), dispute the latter point, relying on the statement in *Ray* that, "[o]f course, that a tanker is certified under federal law as a safe vessel insofar as its design and construction characteristics are concerned does not mean that it is free to ignore otherwise valid state or federal rules or regulations that do not constitute design or construction specifications." Br. in Opp. 16-17 (quoting 435 U.S. at 168-169). But that sentence does not mean that all state laws addressing subjects other than design and construction are categorically saved from preemption. To the contrary, the Court referred to state rules that are "otherwise valid," and it then proceeded to consider whether state rules governing the operation of vessels in Puget Sound were preempted under Title I of PWSA. See 435 U.S. at 171-178.[1]

[1] Remarkably, NRDC contends (Br. in Opp. 19) that a Ninth Circuit decision, *Chevron U.S.A., Inc.* v. *Hammond*, 726 F.2d 483 (1984), cert. denied, 471 U.S. 1140 (1985), "explicitly limited the holding of *Ray* to 'design characteristics,' and acknowledged the obligation of tankers to meet otherwise valid state regulations that do not constitute design or construction obligations." The Ninth Circuit, of course, would have had no authority to "explicitly limit" the holding of this Court in the manner NRDC suggests, and in fact it did not do so. It observed only that the *field preemption* analysis in *Ray* was limited to design and construction, which were governed by Title II of the PWSA while specifically noting that *Ray* also held that certain other state rules *were* preempted under Title I. See *id.* at 487 & n.5. Accord *Beveridge* v. *Lewis*, 939 F.2d 859, 861-863 (9th Cir. 1991) (cited at State Br. in Opp. 16)).

Significantly, moreover, less than eight months after *Ray* was decided, Congress revised and reenacted both Title I and Title II of the PWSA, without disturbing the Court's holdings in *Ray* regarding the preemptive force of Coast Guard regulations. See Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471. In doing so, Congress directed the Coast Guard to consult with and consider the views of "officials of State and local governments" before issuing regulations under the PWSA. §§ 2, 5, 92 Stat. 1478, 1484 (now codified at 33 U.S.C. 1231(b)(2), 46 U.S.C. 3703(c)(2)). As we explain in the petition (at 21), those provisions plainly do not contemplate that—after the Secretary has considered the States' views, taken international standards and other relevant factors into account, and elected to adopt uniform national standards on a particular subject—the states are then free to adopt divergent laws on the very same subject.

2. The State concedes that a state rule governing the operation of oil tankers or the staffing, training and qualifications of their officers and crew is preempted under *Ray* if it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." Br. in Opp. 17; see *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). The State argues, however, that all of its Best Achievable Protection (BAP) rules survive that standard, for three reasons. None has merit.

a. The State contends (Br. in Opp. 24) that a state rule is preempted under the PWSA only if it is impossible for a vessel to comply with both the Coast Guard regulation and the

state rule. That argument is incorrect. In *Ray*, this Court held that the State's rule barring all vessels in excess of 125,000 DWT from Puget Sound was preempted not because it would have been impossible for a vessel to comply with both that rule and the Coast Guard's more limited rule (since a vessel in excess of 125,000 DWT could have complied with both if it stayed out of Puget Sound altogether), but because the Coast Guard had taken a different approach and decided not to impose a complete prohibition. See 435 U.S. at 173-178; accord *id.* at 171-173 (similar analysis of state tug-escort rule). Furthermore, as the State elsewhere concedes, physical impossibility is only one ground for finding conflict preemption; state law also is preempted if it stands as an obstacle to the full accomplishment of Congress's purposes (see Br. in Opp. 11, 17)—as *Ray* itself makes clear, both in its recitation of general preemption principles, see 435 U.S. at 158 (quoting *Hines*, 312 U.S. at 67), and in its preemption holdings under Title I of the PWSA, 435 U.S. at 169-178.

b. The State also contends (Br. in Opp. 18-24, 25) that its rules are not preempted because they serve the same general purpose as the PWSA—the prevention of oil spills. A mere similarity of general purposes, however, does not save state law from preemption; the preemption inquiry turns on how the federal law achieves its purposes. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice —and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987).

That principle applies with particular force here, because the protection of oil spills is not the only (much less unyielding) purpose of the PWSA. As this Court explained in *Ray*, the PWSA embodies a considered judgment by Congress that the Coast Guard must have authority to adopt uniform

national rules when it finds that approach appropriate after balancing all relevant considerations, see 435 U.S. at 161-168, and that even on matters of more local concern, the decision as to what standards will govern should be made by a single entity (the Coast Guard), rather than by the 23 coastal states, each acting individually, see *id.* at 169-171, 175-178. The PWSA also embodies a judgment by Congress that issues concerning the design and construction of both United States and foreign-flag tankers and the staffing, duties and qualifications of their officers and crew should be addressed through a system of international negotiation and reciprocity, and that the Coast Guard must be able to pursue that approach so that the Nation may speak with one voice and promote workable international standards. See *id.* at 166-168; Pet. 2-7, 21-22, 24-28. Respondents' view that any state law that purports to promote the prevention of oil spills is not preempted ignores those weighty congressional objectives.

c. Ultimately, the State relies on Section 1018 of OPA, 33 U.S.C. 2718, in arguing that all of its rules are valid. See Br. in Opp. 18-22. Thus, the State asserts that Congress "used very broad language in subsections (a)(1) and (c)(1) to signify its intent that *no* areas of state authority over the discharge of oil were preempted" (see Br. in Opp. 19), and that OPA therefore divested the Coast Guard of the power this Court had previously recognized in *Ray* to issue regulations that preempt state rules (Br. in Opp. 28-30). See also NRDC Br. in Opp. 2-4, 13-16, 21-23. The text of Section 1018 refutes that assertion. Section 1018 provides only that "[n]othing in this Act"—*i.e.*, nothing in OPA itself—shall affect the authority of the States to impose certain requirements. It in no way affects the preemptive effect of *other* Acts, such as the PWSA, or of Coast Guard regulations issued under those Acts. See Pet. 22. To the contrary, the Conference Report on OPA expressly states that it "does not disturb the Supreme Court's decision in *Ray* v. *Atlantic Richfield*

Company, 435 U.S. 151 (1978)," H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. 122 (1990), which confirmed the preemptive effect of Coast Guard regulations issued under the PWSA.[2]

The State attempts to explain away the Conference Report's affirmation of *Ray* by asserting that "*Ray* held only that the field of tanker design and construction was preempted." Br. in Opp. 22. Having misstated the holding in *Ray* (see pp. 2-3, *supra*), the State then imputes its misunderstanding to the Conference Committee that inserted Section 1018. Congress's intent not to "disturb" the "decision" in *Ray* must include *Ray*'s holding that Coast Guard regulations addressing other subjects under the PWSA preempt conflicting state rules.

Unlike respondents, the court of appeals recognized that Section 1018 by its terms does not apply to the PWSA or other statutes that confer authority on the Coast Guard to issue regulations that preempt state law. See Pet. App. 11a-12a. The court nevertheless held that Section 1018 of OPA, as Congress's most recent statute in the field, has a sort of penumbral effect that divests the Coast Guard of that authority under other statutes. *Id.* at 15a-16a. Respondents make no effort to defend that startling proposition, which cannot in any event be reconciled with the bedrock principle under the Constitution that Congress can change the law only by passing a new law. See Pet. 22.

The Ninth Circuit's ready acceptance of the notion that nothing more than the general tenor of OPA could divest the Coast Guard of its preemptive authority in an area so dominated by national and international interests contrasts

[2] The legislative history of OPA quoted by the State (Br. in Opp. 20-22) similarly shows only that Congress did not intend for OPA to preempt state law in certain respects. And contrary to NRDC's contention (Br. in Opp. 23-24), the statements of Coast Guard officials it quotes in no way suggest that OPA freed States to adopt rules that conflict with Coast Guard regulations.

sharply with the First Circuit's recent decision in *National Foreign Trade Council* v. *Natsios*, No. 98-2304, 1999 WL 398414 (June 22, 1999). There, the court noted that "[p]reemption will be more easily found where states legislate in areas traditionally reserved to the federal government, and in particular where state laws touch on foreign affairs." 1999 WL 398414, at *31. The First Circuit therefore rejected Massachusetts's "unilateral strategy toward Burma [in imposing trade sanctions, because that approach] directly contradicts the federal law's encouragement of a multilateral strategy." *Id.* at *35. The Ninth Circuit, by contrast, has permitted Washington to embark on a "unilateral strategy" of tanker regulation, notwithstanding that the Coast Guard, pursuant to congressional directives, has worked with other nations to develop a multilateral, international regime.[3]

3. For the foregoing reasons, the Coast Guard plainly retains its power to issue regulations that preempt state rules on the same subject. Coast Guard regulations may have that effect where they expressly provide that state rules are preempted (see 98-1706 Intertanko Pet. 7-8, 22-23), or where the state rules would conflict with Coast Guard regulations. Without attempting to canvas all of the Washington rules that are (or may be) preempted (see *id.* at 11), we shall briefly respond to the State's contention (Br. in Opp. 25-28) that its rules addressing the four subjects discussed in our petition for certiorari (at 17-20) do not conflict with Coast Guard regulations.

Operating Procedures; Restricted Visibility. Enforcement of the BAP rules establishes a direct conflict with federal

[3] The First Circuit in *NFTC* also rejected the proposition, relied upon by the Ninth Circuit in this case, that "the fact that state and federal legislation share common goals, either in whole or in part, is * * * sufficient to preclude a finding of preemption," concluding that "[t]he crucial inquiry is whether a state law impedes the federal effort." 1999 WL 398414, at *35.

regulations regarding crew rest. Although the State asserts (Br. in Opp. 26) that its regulations have little practical conflicting consequence because they only apply to "the 60 miles between buoy J and Port Angeles where pilotage waters begin," that assertion is incorrect. To comply with the additional watch functions prescribed by the state BAP rules, a vessel would have to encroach by at least 4 hours into the mandated rest period. See Pet. 17. That encroachment occurs in violation of federal regulations, which the State cavalierly dismisses with the opinion that "additional rest for a crewman might be required later." Br. in Opp. 26.

Drug and Alcohol Testing and Reporting. The State contends (Br. in Opp. 27) that its BAP rules do not conflict with international standards because those standards are merely "guidance." The State ignores, however, that its rules differ from the Coast Guard's regulations, and it does not deny that its rules purport to apply to vessel activities anywhere in the world, even to vessels that might arrive in Washington waters weeks or months later. See Pet. 18.

Crew Training Policies. The State insists that we are "simply wrong" (Br. in Opp. 27) in noting that the training required by the State goes beyond national and international standards, but the most it is prepared to say is that its rule is "very similar" to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers. That bare assertion is scarcely sufficient to establish that the state training requirements are not preempted. Moreover, even if the state rule on this or some other subject is substantively the same as that set forth in Coast Guard regulations or international standards, the assertion by a State of independent authority to enforce its own rules against foreign vessels would seriously disrupt the federal scheme. See pp. 9-10, *infra*; Pet. 5-7, 19.

Language Proficiency Requirements. The State contends (Br. in Opp. 28) that its rule is "consistent with the international standard," but that contention is patently incorrect.

As we explain in the petition (Pet. 19-20), and, which the State makes no real effort to rebut, there is a significant difference between an officer's being able to communicate with those who are part of the navigation watch with respect to matters of watchkeeping, and an officer's being able to "speak a language understood and spoken by subordinate officers and unlicensed crew," Wash. Admin. Code § 317-21-250(1) (1998), most of whom bear no relation to the watchkeeping function.

Although the State disagrees with our analysis of the conflicts as to particular rules, and presumably others that should be assessed on remand, the State does not appear to contest our central contention—that the preemption question should have been assessed by the courts below on a rule-by-rule basis to determine which state rules conflict with Coast Guard regulations. See *Ray*, 435 U.S. at 158. That approach best balances the true federalism interests: leaving room for the exercise of state police powers in areas not preempted by federal regulations, while ousting particular rules that frustrate the accomplishment of federal objectives. That approach cannot be implemented, at least on the West Coast, so long as the Ninth Circuit's decision stands.

4. The decision below has significant adverse repercussions for the United States' ability to fulfill its international obligations and to engage in multilateral negotiations regarding international shipping. The State argues that "the claim of international uniformity is illusory," Br. in Opp. 23, largely because of difficulties with foreign flag vessels' alleged noncompliance with safety rules. Whatever difficulties arise because of episodic noncompliance by vessel operators can be and are addressed by policing efforts by the appropriate authorities (*i.e.*, the U.S. Coast Guard) at the port of entry.[4] The State is simply wrong in asserting (Br. in Opp.

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[4] The State misunderstands the Coast Guard's responsibilities, which include inspecting foreign flag vessels that enter United States ports for

24) that "allowing States to apply their health and safety laws to oil tankers does not impair a uniform international system, because international uniformity is lacking": by longstanding arrangement, the policing of such matters regarding oil tankers occurs at the national and international levels. See Pet. 7.

In the PWSA, Congress specifically provided that tank vessels carrying oil are permitted to operate in the United States waters "only if the vessel has been issued a certificate of compliance by the Secretary." 46 U.S.C. 3711(a). Congress did not confer on states the authority to oust the federal enforcement regime through the promulgation of different rules or the application of different enforcement standards to state rules that are identical or similar to federal regulations. It is the responsibility of Congress and the Executive Branch, and not individual states, to address whatever problems may exist regarding foreign flag compliance with national and international rules. The fact that *Congress* has chosen to depart in certain narrowly targeted respects from an internationally uniform set of rules does not mean that the *states* may balkanize the rules that govern interstate and international shipping in the United States.

* * * * *

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

SETH P. WAXMAN
Solicitor General

JULY 1999

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compliance with national and international rules and, if necessary, detaining vessels that do not comply. Thus, the responsibility for enforcement does not fall solely on the flag nation, but also includes an important role for port-nation control inspections when foreign flag vessels enter another country's port. See *Procedures for Port State Control*, International Maritime Organization Assembly Res. A.787(19) ¶¶ 1.1, 1.3.2, 1.3.3, 2.1, 2.2, 2.6 (Nov. 23, 1995).

(6) (6)

No. 98-1706, 98-1701

Supreme Court, U.S.
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In the
Supreme Court of the United States

October Term, 1998

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), PETITIONER

v.

GARY LOCKE, Governor of the State of Washington; CHRISTINE O. GREGORIE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County; K. CARL LONG, Prosecutor of Skagit County; JAMES H. KRIDER, Prosecutor of Snohomish County; NORMAN MALENG, Prosecutor of King County; NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL and OCEAN ADVOCATES, Respondents

UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS BRIEF BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITION'S INTERTANKO AND UNITED STATES

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No. 98-1706

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October Term, 1998

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), PETITIONER

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UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.

BRIEF OF MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR CERTIORARI[1]

The Maritime Law Association of the United States (hereinafter "MLA") respectfully submits this brief as *amicus curiae* in support of the Petitions for Writ of Certiorari filed by the United States of America and the International Association of Independent Tanker Owners. [2]

INTEREST OF AMICUS CURIAE

The MLA is a nationwide bar association founded in 1899, with a membership of about 3,600 attorneys, law professors and others interested in maritime law. Its attorney members, most of whom are specialists in admiralty law, represent all maritime interests, including shipowners, charterers, cargo interests, port authorities, seaman, longshoremen, passengers, underwriters, and other maritime claimants and defendants.

The purposes of the MLA are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and enforcement, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the ComitÕ Maritime International and as an affiliated organization of the American Bar Association, and to act with other

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[1]This Brief was authored by James Patrick Cooney, attorney for the Maritime Law Association of the United States, and Howard M. McCormack, President of the Maritime Law Association of the United States. No person or entity other than the Maritime Law Association made a monetary contribution to the preparation or submission of the Brief.

[2]The MLA has received and filed the written consent of Governor Gary Locke and the other state respondents in both Nos. 98-1701 and 98-1706 and the written consent of the International Association of Independent Tanker Owners, the Petitioner in in No. 98-1706. The MLA has requested, but has not received written consent from the United States and requests that this Brief also be considered a Motion for Leave to File an Amicus Brief in No. 98-1701.

> associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives, the MLA has sponsored a wide-range of legislation dealing with maritime matters during its 100 years of existence, including the Carriage of Goods by Sea Act,[3] the Federal Arbitration Act, [4] and the Foreign Sovereign Immunities Act. [5] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation. [6]

The MLA assists in maritime projects undertaken by agencies of the United Nations, and works closely with the International Maritime Organization (IMO).

The MLA is one of some 57 national maritime law associations constituting the ComtÕ Maritime International, [7] seeking international uniformity in maritime laws through international conventions.

Uniformity in maritime law, both national and international, prompted the adoption in 1975 by the MLA of a Resolution which states:

> RESOLVED, that the Maritime Law

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[3]46 U.S.C§§1300-1315.

[4]9 U.S.C.§§1-5.

[5]28 U.S.C.§§ 1330, 1602-1611.

[6] E.g., Water Pollution Control Act Amendments of 1972, 33 U.S.C.§§1251-1376; Convention of the International Regulations to Prevent Collisions at Sea, 28 U.S.T. 3459, *as amended*, T.I.A.S. 10672; United States Inland Navigation Rules, 33 U.S.C.§§2001-2073.

[7]These now include Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, Finland, France, Germany, Greece, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, D.P. R. Korea, Malaysia, Malta, Mauritanie, Mexico, Morocco, Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Singapore, Slovenija, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Russia, Venezuela and Yugoslavia.

> Association of the United States considers it of the utmost importance and in the public interest that maritime law be uniform to the maximum extent possible throughout the United States. In 1986, the MLA reaffirmed the policy by the following Resolution:
>
> Now, therefore, this Association reaffirms its support of the importance of maintaining national uniformity in maritime law and approves action, subject to the By-Laws, to express such support, including filing amicus briefs and supporting proposed legislation or other action which favors uniformity in maritime law, and opposing proposed legislation or other action with impairs uniformity in maritime law.

In furtherance of its policy on uniformity, the MLA has appeared before this Court as *amicus curiae* on numerous occasions to argue in favor of the principle of uniformity in the substance and application of the Maritime Law of the United States.[8]

SUMMARY OF ARGUMENT

1. The decision of the Ninth Circuit in *Intertanko vs. Locke* poses a significant threat to the ability of the United States to uniformly and consistently regulate the operation of merchant vessels calling at American ports and to effectuate any coherent national policy consistent with its international treaty obligations directed to the safe operation of such vessels and the protections of the environment. A Writ of Certiorari should be granted in this case to allow this Court to settle the significant issues raised regarding the balance to be achieved among the competing state, federal and international interests

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[8] *E.g.* M*oragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Air Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Chick Kam Choo v. Exxon Corporation, 486* U.S. 140 (1989); *Sisson v. Ruby, 497 U.S. 358 (1990); American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1996); *Exxon Co., U.S.A. v Sofec, Inc.*516 U.S. 1091 (1996); *Bouchard Transp. Co., Inc. v. U.S.*,U.S., 119 S.Ct. 1095 (Mem.) (1999).

regarding the regulation of vessel safety and operations.

2. The decision below is fundamentally flawed so that review by this Court is required. It then holds that OPA90 best reveals the overarching purpose of Congress in regulating vessel safety so that the state statues directed to the prevention of marine pollution cannot be preempted by federal regulation. [9] It then holds that OPA90 best reveals the overarching purpose of Congress in regulating vessel safety so that directed to the prevention of marine pollution cannot be preempted by federal regulation.

3. The decision ignores the preemptive effect of federal regulation in the area of maritime safety as recognized in *Ray vs. Atlantic Richfield Co.*[10] and the preemptive effect of international conventions dealing with vessel safety to which the United States is a party.

ARGUMENT

I. The *Intertanko* Decision[11] Poses a Significant Threat to the Ability of the United States to Uniformly and Consistently Regulate the Operation of Merchant Vessels

From the earliest days of our nation, courts, legislatures and scholars have recognized that the regulation of waterborne commerce between the States and with foreign counties demands a uniform and consistent approach and, therefore, is an area to be dealt with primarily at the federal level. [12] More recently, the United States has opted to participate in international efforts through the International Maritime Organization (IMO) to develop, implement and enforce an effective mandatory international legal regime designed to promote merchant vessel

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[9] 33 U.S.C. §1018.

[10] 435 U.S. 151 (1978)

[11] *Int'l Assoc. of Indep. Tanker Owners v. Locke*,148 F.3d 1053 (9th Cir. 1998), *reh. denied*, 159 F.3d 1220 (9th Cir. 1998) (hereafter "*Intertanko*")

[12] *See, e.g.*, The Federalist, No. 11,(Hamilton); *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1923).

safety and prevent marine pollution by vessels. [13] It has also become party to numerous international conventions and other agreements establishing comprehensive rules and standards for merchant vessels. These rules and standards have been adopted by our domestic laws, so that vessels meeting international standards are also in compliance with our national vessel requirements and on that basis are allowed to enter our ports. [14]

The statutes and regulations of the State of Washington which are at issue in this case [15] attempt to impose standards regarding vessel safety and the prevention of pollution that differ from both the federal and international standards. In *Intertanko*, the Ninth Circuit has held that the Washington State statute and regulations were not preempted by either federal law or by international convention. If the Ninth Circuit decision is allowed to stand, the ability of the national government, and the United States Coast Guard in particular, to effectively regulate the operation of tankers and other vessels calling on the ports of this nation will be significantly eroded. The way will be left to open to for the States and their political subdivisions [16] to effectively displace the federal government in its role as the principal regulator of our maritime commerce.

This possible displacement of the federal government as

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[13] For a listing of the International convention implicated, see, Petition of United States of America for writ of Certiorari in no. 98-1701: See , Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. Mar.L.& Com. 565 (1998) (Allen Part II)

[14] *See, e.g.*, 46 U.S.C.§§3710(a) and 3711(a).

[15] Oil and Hazardous Substances Spill Prevention and Response Act, 1991 Wash. Laws ch. 200 Wash. Rev. Code ch. 88.46.010*et seq.*; Wash. Admin. Code§§317-21-010 *et seq.*

[16] It should be noted that the statutory provision upon which the Ninth Circuit's preemption analysis is based, Section. 1018 of OPA90, preserves the authority of States and *their political subdivisions* to impose requirements with respect to the discharge of oil. 33 U.S.C.§ 2718b. Arguably, the decision for which review is being sought allows not only the states, but state port authorities, municipalities and other political subdivisions to regulate vessel operations concurrently with the federal government.

the principal regulator of maritime commerce is made all the more troublesome when considered in the context of the growing body of international law dealing with safety at sea generally and the prevention of pollution in particular, since it is this body of international law that forms the basis of the federal government's approach to vessel regulation. If, indeed, statutory efforts of a state to regulate the operation of tankers and other ocean going vessels cannot be preempted by treaty or by federal statutes and regulation, the stage will be set for the balkanization of vessel regulation in the United States and the collapse of the current approach of our federal government to achieve vessel safety through a mandatory international legal regime. Efforts to provide uniform rules and regulations consistent with the various international conventions regarding safety at sea and various other maritime issues to which the United States is a signatory will be frustrated and international treaties and federal statutes and regulations will be relegated to the status of "minimum standards," [17] to be augmented by the states and local regulation. Any sense of uniformity in the area of maritime regulation will be lost and a patch work of local standards will come into existence, creating "precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent." [18]

It is this threat to the uniformity of the maritime law of the United States that constrains the MLA to appear before this Court as *amicus curiae* to urge that the Petitions for Writ of Certiorari filed by the International Association of Independent Tanker Owners and the United States be granted and that the decision of the Court of Appeals in this case be reversed. The very nature of maritime commerce demands that its regulation be uniform and consistent. It goes without saying that the United States is the principal maritime trading nation of the world. At the same time, our own merchant marine has been substantially reduced so that we are dependent to a great extend on foreign vessels to transport goods to and from our shores. To encourage and facilitate our ocean borne commerce, to provide for the safe operation of vessels coming to our shores and to meet our international treaty obligations, uniform and consistent national

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[17] *See Intertanko*, 148 F.3d 1053, 1063.

[18] *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 286 (1977).

standards are necessary. For these reasons, the primary responsibility for the regulation of vessel operation and safety must be left to the federal government. The state statute at issue here encroaches and overlaps into an area that must remain preemptively federal and to that extent should be preempted by federal law and regulations under the Supremacy Clause of the U.S. Constitution. [19]

At the heart of this matter is the heightened awareness of and concern for the environment resulting from several significant and well-publicized oil spills resulting from vessel casualties, the most notable being the Exxon Valdez spill in 1989 which lead to the passage of the *OPA90* and the Washington statute here at issue. The policy determination made by the Congress to allow the states and their political subdivisions a role in the area of environmental regulation raises the question of how to reconcile the interests of the several states to protect their environments with the need for uniform and consistent regulation of maritime commerce. There is no question that the States have the inherent right under their police power to prohibit the discharge of pollutants into the environment within their boundaries, to establish standards regarding the response and abatement of such a discharge, and to impose civil and criminal liabilities to deter such harm to the environment. Implicit in this right to prohibit pollution is the interest of the states in the implementation of laws and regulations aimed at the prevention of pollution within their borders. In the maritime context, however, the environmental interests of the States must be balanced against the

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[19]The Constitutional basis of the preemptive federal role in the regulation of maritime commerce is clear. Article I, Section 8, Clause 3 (The Commerce Clause) states: "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states. Article I, Section 8, Clause 18 (The Necessary and Proper Clause) states that "The Congress shall have power * * * To make all laws which shall be necessary and proper for the carrying into Execution the foregoing Powers * * *. " Article III, Section 2, Clause 3 (The Admiralty Clause) states: "The judicial power shall extend * * * To all cases of admiralty and maritime jurisdiction." It is now firmly recognized that these provisions empower Congress to make maritime law. *See Panama, supra*, note 129. *Cf. Miles v. Apex Marine Corp.*498 U.S. 19, 36 (1990) , noting that "Maritime tort law is now dominated by federal statute. . ." Article VI, Section 2, (The Supremacy Clause) makes federal maritime law binding on the states: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

federal responsibility to provide for the uniform and consistent regulation of maritime commerce.

As is the case here, the effort of the State of Washington to protect its waters and shores from oil pollution brings it into direct conflict with the efforts of the federal government to address identical and related concerns on a national and international level. Washington has issued broad and comprehensive regulations establishing standards in the areas of incident reporting, watch keeping and lookout practices, bridge resource management, navigational practices, engineering practices, testing of engineering, navigational and propulsion systems, emergency procedures, record keeping, personnel training, drug and alcohol testing, personnel job performance evaluation, work hours, language proficiency, and management practices. All of these regulations are for the stated purpose of preventing pollution. The decision below has upheld the right of the State of Washington to regulate these areas of vessel activity notwithstanding the fact that these areas are dealt with comprehensively by federal statute and international convention. Vessels that call in ports of the State of Washington must comply not only with the standards and requirements imposed by federal regulation, but also the additional and differing standards and requirements of the State of Washington. [20]

If the decision below is allowed to stand, the legal framework on which we regulate our maritime commerce will become fragmented, uncertain, and unnecessarily contentious. [21] The question of whether this dual state-federal regulation of vessel operations in the United States is constitutionally permissible is one of overwhelming concern to the maritime industry and should be addressed by this Court now, without waiting for action by other States or further parallel developments in the lower courts.

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[20]Unfortunately, the problem is not restricted to vessel actually calling on ports within the State of Washington, since the Washington statute would apply to vessels required to pass through state waters en route to ports in Canada, implicating our treaty obligations with Canada and the right of innocent passage generally.

[21]As noted the Petition of the United States of America in No. 98-1701 at 26 , many nations have protested the Washington state regulations.

II. The Decision Below Is Fundamentally Flawed so that Review by this Court is Required.

A. The Regulatory Overlap.

At issue in this case is a statute of the State of Washington directed to the protection of state waters from oil pollution by oil tankers and regulations of the State of Washington issued pursuant thereto dealing with, *inter alia,* event reporting, operating procedures and watch practices, navigational practices, engineering practices, crew training, crew work hours, language requirements, and record keeping. The same areas are dealt with by OPA90, the Ports and Waterways Safety Act (PWSA), [22] a comprehensive body of regulations issued by the United States Coast Guard pursuant to these statutes, [23] and a number of international treaties and conventions dealing with maritime safety and the environment. [24] The PWSA contains two titles. Title I is codified at Sections 1221-1227 of Title 33 U.S.C.and authorizes the establishment of vessel traffic control systems, the restriction of the operations of tankers not having specified capabilities and the negotiation of international treaties on vessel safety. Title II is codified in Title 46 of the U.S. Code and requires the Secretary of Transportation to adopt uniform federal regulations for tanker design, construction, equipment, and operation, [25] and delegates the Secretary's obligations to issue regulations to the U.S. Coast Guard. [26] The PWSA was supplemented in 1978 by the Port and Tanker Safety Act (PTSA), [27] which requires the Secretary of Transportation to establish regulations dealing with vessel management, drug and

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[22]Pub. L. No. 92-340, 86 Stat. 424 (1972).

[23]*E.g.*, 58 Fed. Reg. 27,268 (1993) (regulating watch keeping practices); 60 Fed Reg. 24,767, 24, 771 (1995) (regulating steering gear); 58 Fed. Reg. 68,274, 68,277 (1993) (regulating drug testing)

[24]*See* Petition of United States for Writ of Certiorari in No. 98-1701, at 3.

[25]46 U.S. C. §3703.

[26]46 U.S.C § 2104.

[27]46 U.S.C. §§ 9101, 9102.

alcohol testing, seafarer training and qualifications, casualty reporting, seafarer discipline, manning, work hours, pilotage, and language proficiency requirements.

Finally, OPA90 imposes several requirements including a provision for random drug and alcohol testing, [28] limited working hours for tanker crews, [29] and a requirement that tankers be equipped with double hulls. [30]

B. The Decision Below.

The Ninth Circuit held in *Intertanko* that the Washington statute and regulations dealing with vessel operation and management are not preempted by OPA90, PWSA, PTSA, or by any relevant international treaty or convention. In so holding, the Court relied on section 1018 of OPA90 [31], which provides that "nothing in this Act . . . shall affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability, or requirements with respect to . . . the discharge of oil or the pollution by oil within such State," or that "the authority of the United States or any State or political subdivision thereof . . . to impose additional liability or additional requirements . . . relating to the discharge, or substantial threat of a discharge of oil." The Court assumed without discussion that the state regulations dealing with vessel operations constituted "oil spill prevention requirements" and that such regulations were "with respect to" or "related to" the discharge of oil and thus could not be preempted by anything contained in OPA90.

In concluding that neither the PWSA nor the PTSA preempted the Washington State statute and regulations, the Ninth Circuit held:

> In the field of tanker regulation, the overarching purposes of Congress are best revealed by OPA90. As the most recent federal statute in the

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[28]46 U.S.C.§ 7702.

[29]46 U.S.C.§ 8104(n).

[30]46 U.S.C. § 3703a.

[31]33 U.S.C.§ 2718(a).

field, OPA90 reflects "the full purposes and objectives of Congress." (Citing *Hines vs. Davidowitz*, 312 U.S. 52, 67 (1941)), better than the PWSA, the PTSA or the Tank Vessel Act, all of which OPA90 was designed to complement. [32]

The Court went on to hold:

> Section 1018 of OPA90 sheds considerable light upon the purposes and objective of Congress in effectuating a federal scheme of tanker regulation. That provision demonstrates Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability and compensation. [33]

Under the reasoning utilized by the court below, the state regulation of vessel operations is principally directed to the prevention of oil spills, which is "in respect to" the discharge of oil and as such the state regulation of vessel operation cannot be preempted under section 1018 of OPA90. OPA90 is presumed to be the definite expression of Congressional purpose and objective in the area of vessel regulation, so that the saving effect of Section 1018 is extended to the all federal statutes dealing with vessel regulation. Following this line of reasoning, the court concludes that if the federal statutes upon which the federal regulation of vessels is based cannot preempt state statutory efforts in the same area, the Coast Guard regulations issued pursuant to such statutes cannot preempt state regulation either.

The Ninth Circuit also holds that the Washington regulations are not preempted by several conflicting international treaties, including the International Convention for the Safety of Life at Sea, the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, the Multilateral International Regulations for Preventing Collisions at Sea, the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region, and the United

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[32] *Intertanko, supra*, 148 F.3d at 1062.

[33] *Id.* at 1062.

Nations Convention on the Law of the Sea, [34] relying on its decision in *Chevron U.S.A., Inc. v. Hammond,*[35] which held:

> [T]he PWSA/PTSA does not mandate strict international uniformity. Although the legislative history of the PWSA/PTSA refers to congressional intent to abide by international agreements regarding the regulation of tankers, the statutes nonetheless give the Coast Guard specific authority to establish stricter requirements than those set by international agreements. *This indicates Congress' view that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction.*[36]

C. The Preemption Analysis Followed in *Intertanko* is Flawed.

1. Section 1018 of OPA90 does not save state vessel regulations from federal preemption.

The key component of the preemption analysis utilized below is the broad construction placed on section 1018 of OPA 90. The construction would seem to protect from preemption any state vessel regulation that might contribute to the prevention of vessel pollution in the broadest sense. The construction cannot be sustained. First, there is no authority either in the legislative history or the case law to support the broad construction placed on section 1018. The language of section 1018 is substantially identical to the saving clauses in the Clean Water Act, [37] the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), [38] the Trans-Alaska Pipeline

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[34] *supra*, note 6,

[35] 726 F.2d 483, (9th Cir. 1984) *cert. denied sub nom., Chevron U.S. A., Inc. V. Sheffield*, 471 U.S. 1140, 1985 AMC 2395 (1985).

[36] *Id.*, at 493-94 (emphasis in original).

[37] 33 U.S.C. § 1321(o)(2).

[38] 42 U.S.C. § 9614(a).

Authorization Act (TAPPA), [39] and the Deepwater Port Act. [40] The language has never been construed to provide protection from preemption beyond state liability and removal activities. [41] A consideration of the legislative history of OPA90 also creates serious doubt that there was ever any intent on the part of Congress to extend its effect to pollution prevention regulation or even to the entirety of the consolidation of various legislative initiatives into what eventually became OPA90. [42]

Second, for the Ninth Circuit's preemption analysis to work, it must be accepted that the primary purpose of the regulation of vessel operations and vessel safety is oil spill prevention. Oil spill prevention, however, is only a subset of the many purposes to which the regulation of vessel operations and vessel safety is directed. For instance, regulations directed to the prevention of vessel collision may be seen as directed to the prevention of oil spills since collisions may result in oil spills. Such regulations, however, are more realistically seen as regulations directed to the prevention of the several consequences that may result from a collision including loss of life, personal injury, damage to property, as well as damage to the environment. In the real world, the prevention of oil spills or environmental damage is only one, and perhaps not the primary, purpose behind the regulation of vessel operations. It would seem that the need to protect human life and safety must be recognized as primary. The federal regulation of vessel operations is not directed exclusively to the prevention of oil spills and transcends the limited purposes and objectives the Court below implicitedly assigned to it.

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[39] 43 U.S.C.§1656(e)(1).

[40] 33 U.S.C. §1517(k).

[41] *See, e.g. Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir 1979); Craig H.Allen, *Federalism in the Ear of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part III)*, 30 J. Mar.L.& Com. 85, 124 (1999).

[42] *See generally, Intertanko* , 159 F.3d 1220 (9th Cir.1998) (Graber, CJ, dissenting).

Finally, there is nothing to suggest that section 1018 of OPA90 was intended to relieve the states of the preemptive effect of international treaties dealing with marine safety or pollution prevention. [43]

2. OPA90 does not best reveal the overreaching purpose of Congress in the field of tanker regulation.

Instead of separately treating each of the several federal statutes dealing with vessel safety to determine their preemptive effect on conflicting state regulation, the Court below assumed without analysis or authority that since OPA90 was the most recent federal statute in the field, it reflected "the full purpose and objectives of Congress" better than prior legislation in the field. [44] By doing so, the court reaffirmed the underlying assumption of the decisions that the primary purpose of vessel regulation is the prevention of pollution. Going one step further, the court applied its expansive construction of section 1018 of OPA90 to the entire field of tanker regulation and concluded that section 1018 was a key to the determination of the principal purposes and objectives of Congress in effectuating a federal scheme of tanker regulation and demonstrated "Congress's willingness to permit state efforts in the areas of oil-spill prevention." [45] The approach taken by the Ninth Circuit is logically unsupportable. It totally disregards the strategy that has been followed by the federal government in joining in a mandatory international vessel regulation regime that is implemented domestically through statute and Coast Guard regulation. The purposes and objectives of the PWSA and the PTSA must be considered apart from Congress' purpose and objective in enacting OPA90 or even the Congressional purpose and objective in enacting the portions of OPA90 dealing with pollution prevention. There is every indication that in affirmatively directing the Secretary and the Coast Guard to issue definitive regulations regarding vessel safety and spill prevention

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[43] Allen, surpa, note 41, at 132.

[44] *Intertanko, supra, 148 F.3d* at 1062, citing Hines v. Davidowitz, 312 U.S 52, 67(1941).

[45] *Intertanko, supra, 148 F.3d* at 1062.

in the PWSA/ PTSA, and Title IV of OPA90, it was not the purpose or objective of Congress to permit the states to enter the field of vessel regulation. To the contrary, the clear implication is that Congress intended for there to be a uniform national approach to vessel regulation consistent with the international treaties and conventions dealing with the various aspects of vessel operation, safety, and pollution prevention to which the United States is a party. The Ninth Circuit's failure to focus on the totality of the regulatory approach of the United States to vessel safety and pollution prevention is fatal to its conflict preemption analysis. A proper analysis can lead to no other conclusion but that the statutory and regulatory approach taken by the federal government in this area requires the preemption of state regulation.

3. Preemptive Effect of International Treaties.

The United States is a party to numerous conventions dealing with vessel safety matters, including SOLAS, MARPOL, and STCW, that expressly prohibit the parties to the conventions from imposing stricter standards on foreign flag vessels calling in domestic ports. [46] These conventions seek to mandate compliance with specific standards regarding the vessel design, construction, maintenance, manning, personnel training, and management of vessels imposed by the vessel's flag state (nation), in exchange for assurance by the port state (nation) that compliance with the mandatory international standards will be sufficient for vessels to gain entry to the waters and ports of the port state. [47] If this international vessel regulatory regime is to function in our federal system, conventions entered into by the United States must be accorded preemptive effect over state regulatory efforts seeking to augment or strengthen the convention requirements, no matter how desirable or benign the state regulations may appear.

The court below gave no consideration to how the purposes and objectives of the relevant international conventions

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[46] *See, e.g.*, SOLAS, Part II, note 420, art. VI(d), which provides: "All matters which are not expressly provided for in the present Convention remain subject to the legislation of the Contracting Governments."

[47] *See* Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. Mar.L., & Com. 565, 565-575 (1998)

affect the ability of the states impose vessel regulations. Instead, it gave global effect to its holding in *Chevron U.S.A., Inc. vs. Hammond* [48] that treaties can only create minimum standards and that strict uniformity is not required by international treaties. Having already concluded that all of the relevant congressional purposes and objective of tanker regulation were embodied in OPA90, and that nothing in OPA90 would be frustrated by the Washington State regulations, the court found it unnecessary to consider any legislative or foreign policy objectives that Congress and the President may have sought to obtain through the various conventions and treaties to which the United States is a party that impact the regulation vessel safety. In so doing the Court cut short the conflict inquiry in the preemption analysis by which it must determine whether the state law stands as an obstacle to the accomplishment and execution of the "full purposes and objective of Congress."[49] Had the proper analysis been carried out, there can be little doubt that the Court would have found the Washington statute and regulations preempted by the various international conventions that impact the field of vessel regulation. [50]

4. The Preemptive Effect of Coast Guard Regulations.

The Ninth Circuit points to this Court's decision in *Ray vs.*

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[48] *supra*, note 34.

[49] *See California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989); *Hines v. Davidowitz, supra.*, 312 US 52 (1941).

[50] As noted by one commentator, "[n]othing in OPA90 or its legislative history and no authority cited by the court in Intertanko II, demonstrates a congressional intent to relieve the states of the preemptive effect of the IMO-sponsored marine safety or pollution prevention conventions." Allen, supra, note 41 at 132. Indeed, if it was not Congress' understanding that the states were generally preempted by federal statutes regulating maritime affairs, it would not have been necessary to reserve to the states a role in the liability and response aspects of marine pollution E.g. §1018,OPA90. For other commentaries on the general area, see, Robert H. Nicholas, Jr. *Federal and State Preemption Regarding Vessel Construction and Operation*, 73 Tulane Law Review 1 (1999); Charles L. Coleman, III, *Federal Preemption of State "BAP Laws; Repelling State Boarders in the Interest of Uniformity*, 9 U.S. F. Mar. L.J. 305 (1997).

Atlantic Richfield Co.,[51] as "[t]he leading case on the subject of field preemption of state statutes that regulate tankers," [52] The relevant issue addressed by *Ray* was a provision of Washington State law requiring that certain oil tankers satisfy certain design and safety standards or be required to use tug escorts while operating in Puget Sound. While the tug-escort provision was not found to be a design requirement under Title II to the PWSA, it was held to be "more akin to an operating rule [under Title I of the PWSA] . . . and, as such is a safety measure clearly with the reach of the Secretary's [of Transportation] authority under ĪĪ 1221(3)(iii) and (iv) to establish 'vessel size and speed limitations and vessel operating conditions' and to restrict vessel operations to those with 'particular operating characteristics and capabilities.'"[53] The *Ray* decision goes on to observe that Title I of PWSA authorizes the Secretary to issue regulations to implement such provisions and that 22 U.S.C. Ī1222(b) prohibits States from issuing "higher safety equipment requirements or safety standards," once the Secretary has issued regulations implementing the provision. As this Court held:

> The relevant inquiry under Title I with respect to the State's power to impose a tug-escort rule is thus whether the Secretary has either promulgated his own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all. [54]

Noting that the Secretary had not issued any regulation leave subject, the Court held that the tug escort requirements promulgated by the State of Washington were not preempted. [55]

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[51] *Supra* note 6..

[52] *Intertanko, supra,* 148 F.3d at 1064.

[53] *Ray, supra,* 435 U.S. at 171.

[54] *Ray , supra,* 435 U.S. at 171-172

[55] The Court added:

> It may be that rules will be forthcoming that will preempt the States's present tug-escort rule, but until that occurs, the State's requirement need not give way under the Supremacy Clause.

Id. at 172.

In this case, the Coast Guard has issued regulations pursuant to both Title I and Title II of the PWSA and under OPA90, dealing with very activities sought to be regulated by Washington State. Under the *Ray* analysis, to the extent that the matters dealt with by the state regulations are within the purview of the authority granted to the Coast Guard under Title II, the state regulations should be preempted regardless of whether regulations have issued. To the extent that regulations are promulgated by the Coast Guard under Title I, such regulations would preempt any state regulations dealing with the same subject. Unless the federal government has relinquished its power to issue preemptive regulations regarding vessel operations and vessel safety with the passage of OPA90, the Washington statute and regulations must be found to have been preempted under the *Ray* decision. This would be the result even if the state regulations are considered not to be in direct conflict with their federal counterparts, but merely augmenting the federal regulations. An "overlap" between the scope of the state and federal regulations requires a finding that the state regulations are preempted. [56]

CONCLUSION

If a governmental authority establishes a stricter standard than is required by existing law, the new stricter standard necessarily becomes the minimum standard for that jurisdiction. That is the crux of the problem raised by the decision in the *Intertanko* case. If the U.S. Coast Guard, acting pursuant to federal statute, imposes a stricter standard than that required by an international treaty, that standard becomes the minimum standard in the United States. If a state is able to impose a standard even stricter than imposed by the Coast Guard, the state standard becomes the minimum standard for the state.

If it is at all important that national standards dealing with maritime commerce are uniform, authority to impose stricter

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[56] *See Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 446 (1960).

standards cannot be extended to the states or to their political subdivisions. The result would be chaos. With a degree of proliferation, in state regulation of vessel operation and management, a vessel meeting all of the requirements imposed by the United States under its statutes, regulations, and treaty obligations could be from calling at many American ports.

It is to avoid this kind of practical disruption of maritime commerce that the need for uniformity in maritime law is grounded. As worthy as is the cause of the environment, we must not be allowed us to lose sight of the need for a nationally, *unified* approach to safety at sea and the prevention of pollution in the maritime environment. The need for uniformity in regulation of maritime commerce has not disappeared and perhaps is even more acute today as we attempt to deal with environmental threats that do not recognize either national or state boundaries.

The Petitions for Writ of Certiorari before the Court should be granted so that this Court can settle the extremely significant issues raised by this case concerning the roles of the federal government and the states in the regulation of maritime commerce.

Dated: June 28, 1999

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No. 98-1706

In the Supreme Court

OF THE

United States

OCTOBER TERM 1998

UNITED STATES OF AMERICA,
Petitioner,
vs.
GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE PACIFIC MERCHANT SHIPPING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI OF THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO) AND THE UNITED STATES OF AMERICA

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I. SUMMARY OF ARGUMENT[1]

The decision of the United States Court of Appeals for the Ninth Circuit in this case, holding that statutes and regulations of the State of Washington relating to vessel manning and operation are not preempted by federal law, is squarely in conflict with this Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). While the federal, state and local governments share control over some matters relating to pollution control and enforcement, as well as to vessel navigation in local waters, the federal government has exclusive control over matters relating to vessel design, construction, operation, equipping, personnel qualification, manning and general navigation. State and local governments are not free to conclude that a vessel approved by the federal government to navigate in waters of the United States must meet higher standards to navigate in those waters that are located within state boundaries.

II. INTEREST OF *AMICUS CURIAE*

The Pacific Merchant Shipping Association ("PMSA") is a trade association that represents foreign and domestic shipowners and operators as well as their agents and other maritime entities on the West Coast of the United States. Its predecessor organization was established in 1919. PMSA's members own, operate, manage or represent tankers, dry bulk vessels, vehicle carriers, ferry and passenger vessels, tugs and barges, container ships and general cargo vessels, which represents 75% to 80% of the total vessel tonnage calling at San Francisco Bay ports and Los Angeles area ports; a substantial portion of that tonnage also transits Washington waters in route to or from California ports.

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[1] This brief was authored in whole by counsel for *Amicus Curiae*, and no party other than *Amicus Curiae* made a monetary contribution to its preparation or submission.

By an overwhelming margin, most of the exports from and imports into the United States move by water. In significant part, those goods are moved to and from ports located on the West Coast. In 1998, more than 2,900 ships arrived at and departed from San Francisco Bay ports. Of these, 660 were tanker vessels. In the same year, more than 3,100 ships called at Los Angeles area ports. Of these, more than 700 were tanker vessels. Approximately 1,830 ships, at least 290 of which were tanker vessels, called at ports in Puget Sound in the State of Washington, and approximately 1,879 ships, at least 138 of which were tanker vessels, called at Portland, Oregon. More frequently than not, ships that call at ports on the West Coast of the United States actually call at more than one port during the voyage. Often these ports are in different states, as is the case with a significant number of liner trade vessels that call at multiple West Coast states on the same voyage.

The membership of PMSA represents a substantial portion of the world's merchant shipping tonnage that makes calls at ports on the West Coast of the United States. Approximately 8 of its 35 members own or operate tankers. PMSA submits this *amicus curiae* brief with written consent of all parties, which accompany this brief. SUP. CT. R. 37(2)(a).

III. REASONS FOR GRANTING THE WRIT

In this case the United States Court of Appeals for the Ninth Circuit held that Washington State statutes and regulations relating to the operation of oil tankers in state waters are not preempted by federal law under the Supremacy Clause of the United States Constitution and do not otherwise violate the Constitution. In so holding, the court decided an important question of federal law in a way that conflicts with decisions of this Court.

Following the oil spill involving the *Exxon Valdez* in Alaskan waters in 1989, Congress passed the Oil Pollution Act of 1990 ("OPA 90"). The legislation was ultimately a combination of several bills into one comprehensive act with nine titles. Title I of the Act, which addresses liability and compensation for oil spills, contains two provisions relating to the subject of federal preemption of state law. One provides that "[n]othing in this Act . . . shall . . . affect, or be construed or interpreted as preempting, the authority of any State . . . from imposing any additional liability or requirements with respect to . . . the discharge of oil or other pollution by oil within such State . . ." § 1018(a) of OPA 90, codified at 33 U.S.C. § 2718(a). The other provides that "[n]othing in this Act . . . shall in any way affect, or be construed to affect, the authority of . . . any State . . . to impose additional liability or additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil." § 1018(c) of OPA 90, codified as 33 U.S.C. § 2718(c).

At the time when Congress passed OPA 90, legislation already existed relating to liability and compensation for oil spills. Existing law included the Ports and Waterways Safety Act of 1972 ("PWSA"), codified as amended at 46 U.S.C. § 3701, *et seq.*, and the Port and Tanker Safety Act of 1978 ("PTSA"), codified at 33 U.S.C. § 1221, *et seq.*

The State of Washington also enacted legislation relating to oil tankers and other vessels following the *Exxon Valdez* incident. The State established an Office of Marine Safety, which was empowered to promulgate regulations to protect state waters from oil pollution. The state regulations obligate owners and operators to: 1) report events such as collisions, allisions and near misses of tankers; 2) employ specific watch and lookout practices and manning; 3) record positions every fifteen minutes, prepare comprehensive voyage plans and make frequent compass readings; 4) adhere to

specified engineering and monitoring practices; 5) test and inspect engineering, navigation and propulsion systems before entering or getting underway in state waters; 6) post written crew assignments and procedures relating to shipboard emergencies; 7) retain certain plotting records and the voyage plan in an event in state waters such as a collision, allision or near miss; 8) establish a comprehensive training program for personnel; 9) test and report regarding alcohol and drug use; 10) monitor personnel for fitness for duty; 11) limit hours personnel are allowed to work; 12) require proficiency of officers in English and other languages; 13) maintain training records for crew members of vessels; 14) implement management practices that demonstrate active monitoring of vessel operations and related matters; 15) equip vessels with global positioning, radar systems and emergency towing systems; and 16) provide notification of proposed entry of a vessel into state waters and of hazardous conditions. These regulations apply not only to vessels calling at Washington ports but also to vessels transiting Washington waters enroute to and from Canada or elsewhere. This same subject matter relating to vessel operation and management is regulated by the Coast Guard as authorized by federal statutes. *See* Appendix K to Intertanko's Petition for Writ of Certiorari, No. 98-1706, pages 349a to 353a.

As explained by the United States at pages 17-20 in its Petition for a Writ of Certiorari in *United States of America v. Locke,* No. 98-1701, many of the Washington regulations that were upheld by the Ninth Circuit in this case are inconsistent with federal law, regulations and standards. The inconsistencies include, among others, the requirements relating to the number of licensed deck officers, drug and alcohol testing and reporting, crew training policies and language proficiency of licensed deck officers.

The Ninth Circuit concluded that the Oil Pollution Act of 1990 ("OPA 90"), 33 U.S.C. § 2701 *et seq.*, "reflects the

'full purposes and objectives of Congress'..." better than preexisting legislation on the subject of oil pollution. *The International Association of Independent Tanker Owners (Intertanko) v. Locke,* 148 F.3d 1053, 1062 (9th Cir. 1998). The court held that the Washington regulations are not preempted by federal law because of the two provisions in Title I of OPA 90. The court found that those provisions confirm the absence of Congressional intent in OPA 90 to preempt the authority of any state to impose additional liability or requirements with respect to the pollution of the environment or the substantial threat of pollution by oil. *Id.*

The Ninth Circuit's holding conflicts with the decision of this Court in *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978). There, this Court considered whether federal law preempted then-existing Washington State regulations applicable to tankers. The Court considered the Washington regulations primarily against the Ports and Waterways Safety Act of 1972 ("PWSA"). PWSA contains two titles that overlap somewhat and are designed both to ensure vessel safety and to protect navigable waters, resources and shore areas from tanker cargo spillage. The focus of Title I is traffic control at local ports. *See Intertanko,* 148 F.3d at 1061. The focus of Title II is tanker design, construction and operation. *Id.*

The *Ray* Court noted that Title II declares that the protection of life, property, and the marine environment from harm requires the promulgation of "comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation." 435 U.S. at 161. The Court also noted that the Act directs the Secretary of the Department of Transportation (the Department that includes the Coast Guard) to establish such rules and regulations as necessary with respect to the design, construction, and operation of vessels as well as to a variety of related matters. *Id.*

The Court concluded that, insofar as the design characteristics that were at issue there are concerned, Congress has entrusted the Secretary of Transportation and the Coast Guard with the duty of determining which oil tankers are sufficiently safe to be allowed to transit the navigable waters of the United States. The Court also concluded that Congress intended "uniform national standards that would foreclose the imposition of different or more stringent state requirements." 435 U.S. at 163.

The Court reached a different conclusion as to Title I of the PWSA. The Court noted that the Secretary of Transportation had neither promulgated regulations relating to vessel traffic control issues nor determined that such regulations were unnecessary. As a result, the Court upheld the Washington State regulations that related to the subject of vessel traffic control in local waters as opposed to vessel design. The Court noted, however, that the Secretary may indeed issue regulations that would preempt the authority of the states even in the area of traffic control, but until that occurs, state regulations need not give way under the Supremacy Clause. 435 U.S. at 172.

The import of the decision in *Ray* is that to determine whether a state statute or regulation conflicts with federal law, a federal court must examine each provision of the state statute or regulation as well as any applicable federal provision. Prior to OPA 90, the federal, state and local governments shared control over some matters relating to pollution control as well as to liability and compensation. They also shared control over the navigation of vessels when knowledge of local waters was important. The federal government, however, had exclusive control over matters relating to vessel design, construction, alteration, repair, maintenance, operation, personnel qualification, equipping, manning and general navigation. 46 U.S.C. § 3703.

In enacting OPA 90, Congress did not explicitly repeal the authority that had been conferred upon the Secretary of Transportation and the Coast Guard under the PWSA and other federal statutes. That is significant for, having once given a federal agency the authority to promulgate regulations in a field, Congress must abide by that delegation of authority until it is altered or revoked. *Cf. Immigration and Naturalization Service v. Chadha,* 462 U.S. 919, 955 (1983). The House Conference Committee confirmed in its analysis of the pending legislation that was to become OPA 90 that § 1018 "does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company,* 435 U.S. 151 (1978)." H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess., at 121-22 (1990). Accordingly, nothing in OPA 90 can be construed to demonstrate that Congress intended to repeal Coast Guard regulations that were in effect at the time Congress passed OPA 90, or to prevent the Coast Guard from adopting post OPA regulations that preempt state law.

In empowering a federal agency to act, Congress need not specifically authorize the agency to pass regulations that preempt state law for that agency to have the power to do so. *See City of New York v. Federal Communications Commission,* 486 U.S. 57, 64 (1988). The Coast Guard regulations that were promulgated pursuant to Congressional direction in PWSA were, for the most part, intended to preempt state regulation relating to the operation of vessels. *See* Appendix H to Intertanko's Petition for a Writ of Certiorari, No. 98-1706, at pages 269a-289a and Appendix K at pages 349a-353a.

The Ninth Circuit's decision in this case is inconsistent with the conclusion of the *Ray* Court that the federal judgment of whether a vessel is safe to navigate in waters of the United States prevails over a contrary state judgment. *See* 435 U.S. at 165. The issue is one of extreme importance

to the members represented by PMSA. Under the Ninth Circuit's ruling, other coastal states of the circuit, notably California, Oregon, Hawaii and Alaska, are free to adopt their own, different requirements relating to any aspect of OPA 90. Moreover, in addition to regulating tanker vessels, the State of Washington is now empowered to enforce its regulations that relate to the screening of dry cargo and passenger vessels that transit its waters to determine whether they present a substantial risk of harm to public health and safety of the environment. *See* Wash. Rev. Code § 88.46.050.

Examples of conflicts between Washington regulations and federal law relating to vessel operation and management are set forth in the United States Petition for Writ of Certiorari, No. 98-1701, at pages 17 to 20. The conflicts will require vessel operators otherwise complying with Coast Guard standards and International Agreements to incur additional extraordinary expense and time to comply with the more stringent Washington standards by, for example:

(i) transporting to their vessels additional multilingual officers and crews trained to Washington standards for manning, navigation, engineering and watch standing for transit of their vessels through Washington waters, or maintain such vessel staffing at all times during voyages throughout the world which include Washington waters;

(ii) constantly preparing and maintaining the Washington required records and submitting the reports when required as critiqued at pages 3 and 4, *supra,* which are different in format and content from the Coast Guard requirements, thus imposing duplicate record keeping burdens on operators. These requirements, in large part, apply to the operation of the concerned vessels throughout the world, and not just while in Washington waters; and

(iii) performing random alcohol and drug testing of all crew members on all vessels operated by concerned carriers throughout the world, not just those transiting Washington waters, and reporting the test results to Washington, a rule far more burdensome than the Coast Guard standards and which may violate the laws of numerous flag states of the vessels calling in Washington waters.

These extraordinary requirements and expenses would certainly be compounded should other states such as Oregon, California, Hawaii, and Alaska enact their own detailed regulations on the same subject matter as covered by the Washington regulations. Operators of vessels transiting the waters of multiple West Coast states could be burdened with the exceptional expenses and an extraordinarily difficult management impediment in dealing with multiple record keeping and reporting in different formats, and drug testing, training and transporting officers and crews to comply with multiple and diverse state and federal standards.

Indeed, the expertise of the Secretary of Transportation and the Coast Guard to prescribe national and uniform regulations for the concerned subject matter as directed by 46 U.S.C. § 3703(a), which includes consultation and consideration of views of other interested agencies, authorities and parties described in 46 U.S.C. § 3703(c) and 33 U.S.C. § 1231, will be totally frustrated and wasted. This prevents a national and uniform set of maintenance, operation, equipping, personnel qualifications, and manning standards compatible with international agreements upon which the international maritime community can rely. Moreover, the Ninth Circuit's ruling leaves open the door for a multi-state regulatory mishmash affecting not only tank vessels, but dry cargo and passenger vessels as well, all of which are within the ambit of the concerned Washington statutes. The PMSA members, who are particularly at risk because of

their operations in the states comprising the Ninth Circuit, submit that uniform national maritime standards are necessary for safe and efficient vessel operations for the international maritime community, a public policy well entrenched in federal statutes and regulations.

IV. CONCLUSION

The Pacific Merchant Shipping Association respectfully urges the Court to grant the petitions for a writ of certiorari to establish a national, uniform rule of maritime law that is consistent with the precedents established by this Court.

Respectfully submitted,

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(8) (9)

NO. 98-1706, 98-1701

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Supreme Court of the United States

October Term, 1998

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), PETITIONER

v.

GARY LOCKE, Governor of the State of Washington; CHRISTINE O. GREGORIE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County; K. CARL LONG, Prosecutor of Skagit County; JAMES H. KRIDER, Prosecutor of Snohomish County; NORMAN MALENG, Prosecutor of King County; NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL and OCEAN ADVOCATES, Respondents

UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS BRIEF BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITION'S INTERTANKO AND UNITED STATES

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No. 98-1706

No. 98-1701

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UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.

BRIEF OF MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR CERTIORARI[1]

The Maritime Law Association of the United States (hereinafter "MLA") respectfully submits this brief as *amicus curiae* in support of the Petitions for Writ of Certiorari filed by the United States of America and the International Association of Independent Tanker Owners.[2]

INTEREST OF AMICUS CURIAE

The MLA is a nationwide bar association founded in 1899, with a membership of about 3,600 attorneys, law professors and others interested in maritime law. Its attorney members, most of whom are specialists in admiralty law, represent all maritime interests, including shipowners, charterers, cargo interests, port authorities, seaman, longshoremen, passengers, underwriters, and other maritime claimants and defendants.

The purposes of the MLA are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and enforcement, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comté Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

[1]This Brief was authored by James Patrick Cooney, attorney for the Maritime Law Association of the United States, and Howard M. McCormack, President of the Maritime Law Association of the United States. No person or entity other than the Maritime Law Association made a monetary contribution to the preparation or submission of the Brief.

[2]The MLA has received and filed the written consent of Governor Gary Locke and the other state respondents in both Nos. 98-1701 and 98-1706 and the written consent of the International Association of Independent Tanker Owners, the Petitioner in in No. 98-1706. The MLA has requested, but has not received written consent from the United States and requests that this Brief also be considered a Motion for Leave to File an Amicus Brief in No. 98-1701.

In furtherance of these objectives, the MLA has sponsored a wide-range of legislation dealing with maritime matters during its 100 years of existence, including the Carriage of Goods by Sea Act,[3] the Federal Arbitration Act,[4] and the Foreign Sovereign Immunities Act.[5] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[6]

The MLA assists in maritime projects undertaken by agencies of the United Nations, and works closely with the International Maritime Organization (IMO).

The MLA is one of some 57 national maritime law associations constituting the Comté Maritime International,[7] seeking international uniformity in maritime laws through international conventions.

Uniformity in maritime law, both national and international, prompted the adoption in 1975 by the MLA of a Resolution which states:

> RESOLVED, that the Maritime Law Association of the United States considers it of the utmost importance and in the public

[3]46 U.S.C.§§1300-1315.

[4]9 U.S.C. §§1-5.

[5]28 U.S.C. §§ 1330, 1602-1611.

[6] E.g., Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1251-1376; Convention of the International Regulations to Prevent Collisions at Sea, 28 U.S.T. 3459, *as amended*, T.I.A.S. 10672; United States Inland Navigation Rules, 33 U.S.C. §§2001-2073.

[7]These now include Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, Finland, France, Germany, Greece, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, D.P. R. Korea, Malaysia, Malta, Mauritanie, Mexico, Morocco, Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Singapore, Slovenija, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Russia, Venezuela and Yugoslavia.

interest that maritime law be uniform to the maximum extent possible throughout the United States. In 1986, the MLA reaffirmed the policy by the following Resolution:

> Now, therefore, this Association reaffirms its support of the importance of maintaining national uniformity in maritime law and approves action, subject to the By-Laws, to express such support, including filing amicus briefs and supporting proposed legislation or other action which favors uniformity in maritime law, and opposing proposed legislation or other action with impairs uniformity in maritime law.

In furtherance of its policy on uniformity, the MLA has appeared before this Court as *amicus curiae* on numerous occasions to argue in favor of the principle of uniformity in the substance and application of the Maritime Law of the United States.[8]

SUMMARY OF ARGUMENT

1. The decision of the Ninth Circuit in *Intertanko vs. Locke* poses a significant threat to the ability of the United States to uniformly and consistently regulate the operation of merchant vessels calling at American ports and to effectuate any coherent national policy consistent with its international treaty obligations directed to the safe operation of such vessels and the protections of the environment. A Writ of Certiorari should be granted in this case to allow this Court to settle the significant issues raised regarding the

[8] *E.g.* *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Air Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Chick Kam Choo v. Exxon Corporation, 486* U.S. 140 (1989); *Sisson v. Ruby, 497 U.S. 358 (1990); American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1996); *Exxon Co., U.S.A. v Sofec, Inc.*,516 U.S. 1091 (1996); *Bouchard Transp. Co., Inc. v. U.S.*,U.S., 119 S.Ct. 1095 (Mem.) (1999).

balance to be achieved among the competing state, federal and international interests regarding the regulation of vessel safety and operations.

2. The decision below is fundamentally flawed so that review by this Court is required. It then holds that OPA90 best reveals the overarching purpose of Congress in regulating vessel safety so that the state statutes directed to the prevention of marine pollution cannot be preempted by federal regulation.[9] It then holds that OPA90 best reveals the overarching purpose of Congress in regulating vessel safety so that directed to the prevention of marine pollution cannot be preempted by federal regulation.
3. The decision ignores the preemptive effect of federal regulation in the area of maritime safety as recognized in *Ray vs. Atlantic Richfield Co.*[10] and the preemptive effect of international conventions dealing with vessel safety to which the United States is a party.

ARGUMENT

I. The *Intertanko* Decision[11] Poses a Significant Threat to the Ability of the United States to Uniformly and Consistently Regulate the Operation of Merchant Vessels

From the earliest days of our nation, courts, legislatures and scholars have recognized that the regulation of waterborne commerce between the States and with foreign counties demands a uniform and consistent approach and, therefore, is an area to be dealt with primarily at the federal level.[12] More recently, the United States has opted to participate in international efforts through the International Maritime Organization (IMO) to develop, implement and

[9] 33 U.S.C. § 1018.

[10] 435 U.S. 151 (1978)

[11] *Int'l Assoc. of Indep. Tanker Owners v. Locke*,148 F.3d 1053 (9th Cir. 1998), *reh. denied*, 159 F.3d 1220 (9th Cir. 1998) (hereafter "*Intertanko*")

[12] *See, e.g.*, The Federalist, No. 11,(Hamilton); *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1923).

enforce an effective mandatory international legal regime designed to promote merchant vessel safety and prevent marine pollution by vessels.[13] It has also become party to numerous international conventions and other agreements establishing comprehensive rules and standards for merchant vessels. These rules and standards have been adopted by our domestic laws, so that vessels meeting international standards are also in compliance with our national vessel requirements and on that basis are allowed to enter our ports.[14]

The statutes and regulations of the State of Washington which are at issue in this case[15] attempt to impose standards regarding vessel safety and the prevention of pollution that differ from both the federal and international standards. In *Intertanko*, the Ninth Circuit has held that the Washington State statute and regulations were not preempted by either federal law or by international convention. If the Ninth Circuit decision is allowed to stand, the ability of the national government, and the United States Coast Guard in particular, to effectively regulate the operation of tankers and other vessels calling on the ports of this nation will be significantly eroded. The way will be left open to the States and their political subdivisions[16] to effectively displace the federal government in its role as the principal regulator of our

[13]For a listing of the International convention implicated, see. Petition of United States of America for writ of Certiorari in no. 98-1701: See, Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. Mar.L.& Com. 565 (1998) (Allen Part II)

[14]*See, e.g.*, 46 U.S.C. §§3710(a) and 3711(a).

[15]Oil and Hazardous Substances Spill Prevention and Response Act, 1991 Wash. Laws ch. 200 Wash. Rev. Code ch. 88.46.010 *et seq.*; Wash. Admin. Code §§317-21-010 *et seq.*

[16]It should be noted that the statutory provision upon which the Ninth Circuit's preemption analysis is based, Section. 1018 of OPA90, preserves the authority of States and *their political subdivisions* to impose requirements with respect to the discharge of oil. 33 U.S.C. §2718b. Arguably, the decision for which review is being sought allows not only the states, but state port authorities, municipalities and other political subdivisions to regulate vessel operations concurrently with the federal government.

maritime commerce.

This possible displacement of the federal government as the principal regulator of maritime commerce is made all the more troublesome when considered in the context of the growing body of international law dealing with safety at sea generally and the prevention of pollution in particular, since it is this body of international law that forms the basis of the federal government's approach to vessel regulation. If, indeed, statutory efforts of a state to regulate the operation of tankers and other ocean going vessels cannot be preempted by treaty or by federal statutes and regulation, the stage will be set for the balkanization of vessel regulation in the United States and the collapse of the current approach of our federal government to achieve vessel safety through a mandatory international legal regime. Efforts to provide uniform rules and regulations consistent with the various international conventions regarding safety at sea and various other maritime issues to which the United States is a signatory will be frustrated and international treaties and federal statutes and regulations will be relegated to the status of "minimum standards," [17] to be augmented by the states and local regulation. Any sense of uniformity in the area of maritime regulation will be lost and a patch work of local standards will come into existence, creating "precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent."[18]

It is this threat to the uniformity of the maritime law of the United States that constrains the MLA to appear before this Court as *amicus curiae* to urge that the Petitions for Writ of Certiorari filed by the International Association of Independent Tanker Owners and the United States be granted and that the decision of the Court of Appeals in this case be reversed. The very nature of maritime commerce demands that its regulation be uniform and consistent. It goes without saying that the United States is the principal maritime trading nation of the world. At the same time, our own merchant marine has been substantially reduced so that we

[17] *See Intertanko*, 148 F.3d 1053, 1063.

[18]*Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 286 (1977).

are dependent to a great extend on foreign vessels to transport goods to and from our shores. To encourage and facilitate our ocean borne commerce, to provide for the safe operation of vessels coming to our shores and to meet our international treaty obligations, uniform and consistent national standards are necessary. For these reasons, the primary responsibility for the regulation of vessel operation and safety must be left to the federal government. The state statute at issue here encroaches and overlaps into an area that must remain preemptively federal and to that extent should be preempted by federal law and regulations under the Supremacy Clause of the U.S. Constitution.[19]

At the heart of this matter is the heightened awareness of and concern for the environment resulting from several significant and well-publicized oil spills resulting from vessel casualties, the most notable being the Exxon Valdez spill in 1989 which lead to the passage of the *OPA90* and the Washington statute here at issue. The policy determination made by the Congress to allow the states and their political subdivisions a role in the area of environmental regulation raises the question of how to reconcile the interests of the several states to protect their environments with the need for uniform and consistent regulation of maritime commerce.

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[19]The Constitutional basis of the preemptive federal role in the regulation of maritime commerce is clear. Article I, Section 8, Clause 3 (The Commerce Clause) states: "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states. Article I, Section 8, Clause 18 (The Necessary and Proper Clause) states that "The Congress shall have power * * * To make all laws which shall be necessary and proper for the carrying into Execution the foregoing Powers * * *. " Article III, Section 2, Clause 3 (The Admiralty Clause) states:"The judicial power shall extend * * * To all cases of admiralty and maritime jurisdiction." It is now firmly recognized that these provisions empower Congress to make maritime law. *See Panama, supra*, note 129. *Cf. Miles v. Apex Marine Corp.*,498 U.S. 19, 36 (1990) , noting that "Maritime tort law is now dominated by federal statute. . ." Article VI, Section 2, (The Supremacy Clause) makes federal maritime law binding on the states: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

There is no question that the States have the inherent right under their police power to prohibit the discharge of pollutants into the environment within their boundaries, to establish standards regarding the response and abatement of such a discharge, and to impose civil and criminal liabilities to deter such harm to the environment. Implicit in this right to prohibit pollution is the interest of the states in the implementation of laws and regulations aimed at the prevention of pollution within their borders. In the maritime context, however, the environmental interests of the States must be balanced against the federal responsibility to provide for the uniform and consistent regulation of maritime commerce.

As is the case here, the effort of the State of Washington to protect its waters and shores from oil pollution brings it into direct conflict with the efforts of the federal government to address identical and related concerns on a national and international level. Washington has issued broad and comprehensive regulations establishing standards in the areas of incident reporting, watch keeping and lookout practices, bridge resource management, navigational practices, engineering practices, testing of engineering, navigational and propulsion systems, emergency procedures, record keeping, personnel training, drug and alcohol testing, personnel job performance evaluation, work hours, language proficiency, and management practices. All of these regulations are for the stated purpose of preventing pollution. The decision below has upheld the right of the State of Washington to regulate these areas of vessel activity notwithstanding the fact that these areas are dealt with comprehensively by federal statute and international convention. Vessels that call in ports of the State of Washington must comply not only with the standards and requirements imposed by federal regulation, but also the additional and differing standards and requirements of the State of Washington.[20]

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[20]Unfortunately, the problem is not restricted to vessel actually calling on ports within the State of Washington, since the Washington

(continued...)

If the decision below is allowed to stand, the legal framework on which we regulate our maritime commerce will become fragmented, uncertain, and unnecessarily contentious.[21] The question of whether this dual state-federal regulation of vessel operations in the United States is constitutionally permissible is one of overwhelming concern to the maritime industry and should be addressed by this Court now, without waiting for action by other States or further parallel developments in the lower courts.

II. The Decision Below Is Fundamentally Flawed so that Review by this Court is Required.

A. The Regulatory Overlap.

At issue in this case is a statute of the State of Washington directed to the protection of state waters from oil pollution by oil tankers and regulations of the State of Washington issued pursuant thereto dealing with, *inter alia,* event reporting, operating procedures and watch practices, navigational practices, engineering practices, crew training, crew work hours, language requirements, and record keeping. The same areas are dealt with by OPA90, the Ports and Waterways Safety Act (PWSA),[22] a comprehensive body of regulations issued by the United States Coast Guard pursuant to these statutes, [23] and a number of international treaties and conventions dealing with maritime safety and the environment.[24] The PWSA contains two titles. Title I is codified at Sections 1221-1227 of Title 33 U.S.C.and authorizes

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(...continued)

statute would apply to vessels required to pass through state waters en route to ports in Canada, implicating our treaty obligations with Canada and the right of innocent passage generally.

[21]As noted the Petition of the United States of America in No. 98-1701 at 26 , many nations have protested the Washington state regulations.

[22]Pub. L. No. 92-340, 86 Stat. 424 (1972).

[23]*E.g.*, 58 Fed. Reg. 27,268 (1993) (regulating watch keeping practices); 60 Fed Reg. 24,767, 24, 771 (1995) (regulating steering gear); 58 Fed. Reg. 68,274, 68,277 (1993) (regulating drug testing)

[24]*See* Petition of United States for Writ of Certiorari in No. 98-1701, at 3.

the establishment of vessel traffic control systems, the restriction of the operations of tankers not having specified capabilities and the negotiation of international treaties on vessel safety. Title II is codified in Title 46 of the U.S. Code and requires the Secretary of Transportation to adopt uniform federal regulations for tanker design, construction, equipment, and operation,[25] and delegates the Secretary's obligations to issue regulations to the U.S. Coast Guard.[26] The PWSA was supplemented in 1978 by the Port and Tanker Safety Act (PTSA),[27] which requires the Secretary of Transportation to establish regulations dealing with vessel management, drug and alcohol testing, seafarer training and qualifications, casualty reporting, seafarer discipline, manning, work hours, pilotage, and language proficiency requirements.

Finally, OPA90 imposes several requirements including a provision for random drug and alcohol testing,[28] limited working hours for tanker crews,[29] and a requirement that tankers be equipped with double hulls.[30]

B. The Decision Below.

The Ninth Circuit held in *Intertanko* that the Washington statute and regulations dealing with vessel operation and management are not preempted by OPA90, PWSA, PTSA, or by any relevant international treaty or convention. In so holding, the Court relied on section 1018 of OPA90[31], which provides that "nothing in this Act . . . shall affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability, or requirements with respect to . . . the discharge of oil or the pollution by oil within such State," or that "the authority of the United States or any State or political subdivision thereof . . . to impose additional liability or additional requirements . . . relating to the

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[25]46 U.S. C. §3703.
[26]46 U.S.C. §2104.
[27]46 U.S.C. §§ 9101, 9102.
[28]46 U.S.C. §7702.
[29]46 U.S.C. §8104(n).
[30]46 U.S.C. § 3703a.
[31]33 U.S.C. §2718(a).

discharge, or substantial threat of a discharge of oil." The Court assumed without discussion that the state regulations dealing with vessel operations constituted "oil spill prevention requirements" and that such regulations were "with respect to" or "related to" the discharge of oil and thus could not be preempted by anything contained in OPA90.

In concluding that neither the PWSA nor the PTSA preempted the Washington State statute and regulations, the Ninth Circuit held:

> In the field of tanker regulation, the overarching purposes of Congress are best revealed by OPA90. As the most recent federal statute in the field, OPA90 reflects "the full purposes and objectives of Congress." (Citing *Hines vs. Davidowitz*, 312 U.S. 52, 67 (1941)), better than the PWSA, the PTSA or the Tank Vessel Act, all of which OPA90 was designed to complement.[32]

The Court went on to hold:

> Section 1018 of OPA90 sheds considerable light upon the purposes and objective of Congress in effectuating a federal scheme of tanker regulation. That provision demonstrates Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability and compensation.[33]

Under the reasoning utilized by the court below, the state regulation of vessel operations is principally directed to the prevention of oil spills, which is "in respect to" the discharge of oil and as such the state regulation of vessel operation cannot be preempted under section 1018 of OPA90. OPA90 is presumed to be the definite expression of Congressional purpose and objective in the area of vessel regulation, so that the saving effect of Section 1018 is extended to all federal statutes dealing with vessel regulation.

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[32] *Intertanko, supra*, 148 F.3d at 1062.

[33] *Id.* at 1062.

Following this line of reasoning, the court concludes that if the federal statutes upon which the federal regulation of vessels is based cannot preempt state statutory efforts in the same area, the Coast Guard regulations issued pursuant to such statutes cannot preempt state regulation either.

The Ninth Circuit also holds that the Washington regulations are not preempted by several conflicting international treaties, including the International Convention for the Safety of Life at Sea, the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, the Multilateral International Regulations for Preventing Collisions at Sea, the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region, and the United Nations Convention on the Law of the Sea,[34] relying on its decision in *Chevron U.S.A., Inc. v. Hammond*,[35] which held:

> [T]he PWSA/PTSA does not mandate strict international uniformity. Although the legislative history of the PWSA/PTSA refers to congressional intent to abide by international agreements regarding the regulation of tankers, the statutes nonetheless give the Coast Guard specific authority to establish stricter requirements than those set by international agreements. *This indicates Congress' view that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction.*[36]

C. The Preemption Analysis Followed in *Intertanko* is Flawed.

1. Section 1018 of OPA90 does not save state vessel

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[34] *supra*, note 6,

[35] 726 F.2d 483, (9th Cir. 1984) *cert. denied sub nom., Chevron U.S. A., Inc. V. Sheffield*, 471 U.S. 1140, 1985 AMC 2395 (1985).

[36] *Id.*, at 493-94 (emphasis in original).

regulations from federal preemption.

The key component of the preemption analysis utilized below is the broad construction placed on section 1018 of OPA 90. The construction would seem to protect from preemption any state vessel regulation that might contribute to the prevention of vessel pollution in the broadest sense. The construction cannot be sustained. First, there is no authority either in the legislative history or the case law to support the broad construction placed on section 1018. The language of section 1018 is substantially identical to the saving clauses in the Clean Water Act,[37] the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[38] the Trans-Alaska Pipeline Authorization Act (TAPPA),[39] and the Deepwater Port Act.[40] The language has never been construed to provide protection from preemption beyond state liability and removal activities.[41] A consideration of the legislative history of OPA90 also creates serious doubt that there was ever any intent on the part of Congress to extend its effect to pollution prevention regulation or even to the entirety of the consolidation of various legislative initiatives into what eventually became OPA90.[42]

Second, for the Ninth Circuit's preemption analysis to work, it must be accepted that the primary purpose of the regulation of vessel operations and vessel safety is oil spill prevention. Oil spill prevention, however, is only a subset of the many purposes to which the regulation of vessel operations and vessel safety is directed. For instance, regulations directed to the prevention of vessel collision may be seen as

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[37]33 U.S.C. §1321(o)(2).

[38]42 U.S.C. §9614(a).

[39]43 U.S.C.§1656(c)(1).

[40]33 U.S.C. §1517(k).

[41]*See, e.g. Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir 1979); Craig H.Allen, *Federalism in the Ear of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part III)*, 30 J. Mar.L.& Com. 85, 124 (1999).

[42] *See generally, Intertanko* , 159 F.3d 1220 (9th Cir.1998) (Graber, CJ, dissenting).

directed to the prevention of oil spills since collisions may result in oil spills. Such regulations, however, are more realistically seen as regulations directed to the prevention of the several consequences that may result from a collision including loss of life, personal injury, damage to property, as well as damage to the environment. In the real world, the prevention of oil spills or environmental damage is only one, and perhaps not the primary, purpose behind the regulation of vessel operations. It would seem that the need to protect human life and safety must be recognized as primary. The federal regulation of vessel operations is not directed exclusively to the prevention of oil spills and transcends the limited purposes and objectives the Court below implicitedly assigned to it.

Finally, there is nothing to suggest that section 1018 of OPA90 was intended to relieve the states of the preemptive effect of international treaties dealing with marine safety or pollution prevention.[43]

2. OPA90 does not best reveal the overarching purpose of Congress in the field of tanker regulation.

Instead of separately treating each of the several federal statutes dealing with vessel safety to determine their preemptive effect on conflicting state regulation, the Court below assumed without analysis or authority that since OPA90 was the most recent federal statute in the field, it reflected "the full purpose and objectives of Congress" better than prior legislation in the field.[44] By doing so, the court reaffirmed the underlying assumption of the decisions that the primary purpose of vessel regulation is the prevention of pollution. Going one step further, the court applied its expansive construction of section 1018 of OPA90 to the entire field of tanker regulation and concluded that section 1018 was a key to the determination of the principal purposes and objectives of Congress in effectuating a federal scheme of tanker regulation and demonstrated "Congress's

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[43]Allen, surpa, note 41, at 132.

[44]*Intertanko, supra, 148 F.3d* at 1062, citing Hines v. Davidowitz, 312 U.S 52, 67(1941).

willingness to permit state efforts in the areas of oil-spill prevention."[45] The approach taken by the Ninth Circuit is logically unsupportable. It totally disregards the strategy that has been followed by the federal government in joining in a mandatory international vessel regulation regime that is implemented domestically through statute and Coast Guard regulation. The purposes and objectives of the PWSA and the PTSA must be considered apart from Congress' purpose and objective in enacting OPA90 or even the Congressional purpose and objective in enacting the portions of OPA90 dealing with pollution prevention. There is every indication that in affirmatively directing the Secretary and the Coast Guard to issue definitive regulations regarding vessel safety and spill prevention in the PWSA/ PTSA, and Title IV of OPA90, it was not the purpose or objective of Congress to permit the states to enter the field of vessel regulation. To the contrary, the clear implication is that Congress intended for there to be a uniform national approach to vessel regulation consistent with the international treaties and conventions dealing with the various aspects of vessel operation, safety, and pollution prevention to which the United States is a party. The Ninth Circuit's failure to focus on the totality of the regulatory approach of the United States to vessel safety and pollution prevention is fatal to its conflict preemption analysis. A proper analysis can lead to no other conclusion but that the statutory and regulatory approach taken by the federal government in this area requires the preemption of state regulation.

3. Preemptive Effect of International Treaties.

The United States is a party to numerous conventions dealing with vessel safety matters, including SOLAS, MARPOL, and STCW, that expressly prohibit the parties to the conventions from imposing stricter standards on foreign flag vessels calling in domestic ports.[46] These conventions seek

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[45] *Intertanko, supra, 148 F.3d* at 1062.

[46] *See, e.g.*, SOLAS, Part II, note 420, art. VI(d), which provides: "All matters which are not expressly provided for in the present Convention remain

(continued...)

to mandate compliance with specific standards regarding the vessel design, construction, maintenance, manning, personnel training, and management of vessels imposed by the vessel's flag state (nation), in exchange for assurance by the port state (nation) that compliance with the mandatory international standards will be sufficient for vessels to gain entry to the waters and ports of the port state.[47] If this international vessel regulatory regime is to function in our federal system, conventions entered into by the United States must be accorded preemptive effect over state regulatory efforts seeking to augment or strengthen the convention requirements, no matter how desirable or benign the state regulations may appear.

The court below gave no consideration to how the purposes and objectives of the relevant international conventions affect the ability of the states to impose vessel regulations. Instead, it gave global effect to its holding in *Chevron U.S.A., Inc. vs. Hammond*[48] that treaties can only create minimum standards and that strict uniformity is not required by international treaties. Having already concluded that all of the relevant congressional purposes and objective of tanker regulation were embodied in OPA90, and that nothing in OPA90 would be frustrated by the Washington State regulations, the court found it unnecessary to consider any legislative or foreign policy objectives that Congress and the President may have sought to obtain through the various conventions and treaties to which the United States is a party that impact the regulation vessel safety. In so doing the Court cut short the conflict inquiry in the preemption analysis by which it must determine whether the state law stands as an obstacle to the accomplishment and execution of the "full

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subject to the legislation of the Contracting Governments."

[47] *See* Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. Mar.I., & Com. 565, 565-575 (1998)

[48] *supra*, note 34.

purposes and objective of Congress."[49] Had the proper analysis been carried out, there can be little doubt that the Court would have found the Washington statute and regulations preempted by the various international conventions that impact the field of vessel regulation. [50]

4. The Preemptive Effect of Coast Guard Regulations.

The Ninth Circuit points to this Court's decision in *Ray vs. Atlantic Richfield Co.,*[51] as "[t]he leading case on the subject of field preemption of state statutes that regulate tankers." [52] The relevant issue addressed by *Ray* was a provision of Washington State law requiring that certain oil tankers satisfy certain design and safety standards or be required to use tug escorts while operating in Puget Sound. While the tug-escort provision was not found to be a design requirement under Title II to the PWSA, it was held to be "more akin to an operating rule [under Title I of the PWSA] . . . and, as such is a safety measure clearly with the reach of the Secretary's [of Transportation] authority under §§ 1221(3)(iii) and (iv) to establish 'vessel size and speed limitations and vessel operating conditions' and to restrict vessel operations to those with 'particular operating characteristics and capabilities.'"[53] The *Ray* decision goes on to observe that Title I of PWSA authorizes the Secretary to issue regulations to implement such provisions and that 22 U.S.C. §1222(b) prohibits States from issuing "higher safety equipment requirements or safety

[49]*See California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989); *Hines v. Davidowitz, supra.*,312 US 52 (1941).

[50]As noted by one commentator, "[n]othing in OPA90 or its legislative history and no authority cited by the court in Intertanko II, demonstrates a congressional intent to relieve the states of the preemptive effect of the IMO-sponsored marine safety or pollution prevention conventions." Allen, supra, note 41 at 132. Indeed, if it was not Congress' understanding that the states were generally preempted by federal statutes regulating maritime affairs, it would not have been necessary to reserve to the states a role in the liability and response aspects of marine pollution E.g. §1018,OPA90. For other commentaries on the general area, see, Robert H. Nicholas, Jr. *Federal and State Preemption Regarding Vessel Construction and Operation,* 73 Tulane Law Review 1 (1999); Charles L. Coleman, III, *Federal Preemption of State "BAP Laws; Repelling State Boarders in the Interest of Uniformity,* 9 U.S. F. Mar. L.J. 305 (1997).

[51] *Supra* note 6..

[52]*Intertanko, supra,* 148 F.3d at 1064.

[53]*Ray, supra,* 435 U.S. at 171.

standards," once the Secretary has issued regulations implementing the provision. As this Court held:

> The relevant inquiry under Title I with respect to the State's power to impose a tug-escort rule is thus whether the Secretary has either promulgated his own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all.[54]

Noting that the Secretary had not issued any regulation leave subject, the Court held that the tug escort requirements promulgated by the State of Washington were not preempted.[55]

In this case, the Coast Guard has issued regulations pursuant to both Title I and Title II of the PWSA and under OPA90, dealing within the very activities sought to be regulated by Washington State. Under the *Ray* analysis, to the extent that the matters dealt with by the state regulations are within the purview of the authority granted to the Coast Guard under Title II, the state regulations should be preempted regardless of whether regulations have issued. To the extent that regulations are promulgated by the Coast Guard under Title I, such regulations would preempt any state regulations dealing with the same subject. Unless the federal government has relinquished its power to issue preemptive regulations regarding vessel operations and vessel safety with the passage of OPA90, the Washington statute and regulations must be found to have been preempted under the *Ray* decision. This would be the result even if the state regulations are considered not to be in direct conflict with their federal counterparts, but merely augmenting the federal regulations. An "overlap" between the scope of the state and federal regulations requires a finding that the state

[54]*Ray , supra,* 435 U.S. at 171-172

[55]The Court added:

> It may be that rules will be forthcoming that will preempt the State's present tug-escort rule, but until that occurs, the State's requirement need not give way under the Supremacy Clause.

Id. at 172.

regulations are preempted.[56]

CONCLUSION

If a governmental authority establishes a stricter standard than is required by existing law, the new stricter standard necessarily becomes the minimum standard for that jurisdiction. That is the crux of the problem raised by the decision in the *Intertanko* case. If the U.S. Coast Guard, acting pursuant to federal statute, imposes a stricter standard than that required by an international treaty, that standard becomes the minimum standard in the United States. If a state is able to impose a standard even stricter than imposed by the Coast Guard, the state standard becomes the minimum standard for the state.

If it is at all important that national standards dealing with maritime commerce are uniform, authority to impose stricter standards cannot be extended to the states or to their political subdivisions. The result would be chaos. With a degree of proliferation, in state regulation of vessel operation and management, a vessel meeting all of the requirements imposed by the United States under its statutes, regulations, and treaty obligations could be barred from calling at many American ports.

It is to avoid this kind of practical disruption of maritime commerce that the need for uniformity in maritime law is grounded. As worthy as is the cause of the environment, we must not be allowed to lose sight of the need for a nationally, *unified* approach to safety at sea and the prevention of pollution in the maritime environment. The need for uniformity in regulation of maritime commerce has not disappeared and perhaps is even more acute today as we attempt to deal with environmental threats that do not recognize either national or state boundaries.

The Petitions for Writ of Certiorari before the Court should be granted so that this Court can settle the extremely significant issues raised by this case concerning the roles of the federal government and the states in the regulation of maritime commerce.

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[56] *See Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960).

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Nos. 98-1701 and 98-1706

IN THE

Supreme Court of the United States

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Petitioner,

and

UNITED STATES OF AMERICA,
Petitioner,

v.

GARY LOCKE, Governor of the State of Washington, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Attachment to Reply by Plaintiff Intertanko JA-301

Declaration of Jeffrey Needle in Reply to Intervenors' Motion for Summary Judgement JA-304

Attachment A-Report Of Lord Donaldson's Inquiry Into The Prevention Of Pollution From Merchant Shipping JA-306

Letter of September 28, 1993 From the Washington State Congressional Delegation to Commandant J. William Kime USCG . . . JA-327

Affidavit of Arthur McKenzie JA-330

The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Order and Amended Opinion Of The United States Court of Appeals For The Ninth Circuit Dated And Filed June 18, 1998 And Amended August 31, 1998 (Appendix A) 1a

Order Of The United States District Court For The Western District Of Washington At Seattle Dated, Entered And Filed November 18, 1996 (Appendix B) 39a

Order Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed November 24, 1998 (Appendix C) 75a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

97-35010

INTERNATIONAL ASSOCIATION OF
INDEPENDENT TANKER OWNERS;
Plaintiff-Appellant

USA
Intervenor-Appellant

v.

MIKE LOWRY, Governor of the State of WA, et al
Defendants-Appellees

and

NATIONAL NATURAL RESOURCES DEFENSE COUNCIL;
WASHINGTON ENVIRONMENTAL COUNCIL;
OCEAN ADVOCATES INC.
Intervenors-Appellees

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/24/97	Filed motion by the United States to intervene; served on 4/23/97 [3218850] (MOATT) [97-35010] (gail)
5/9/97	Received original and 15 copies amicus curiae Int'l Chamber of Shipping's brief of 50-pgs; served on 5/7/97 (mtn to file pending) [97-35010] (gail)

DATE	PROCEEDINGS
5/12/97	Filed original and 15 copies intervenor USA's amicus curiae brief of 56-pgs; served on 5/7/97 [97-35010] (gail)
6/6/97	* * * * The mtn to intervene filed by the US is granted. * * * *
7/1/97	Filed original and 15 copies Appellant's opening brief of 92-pgs and 5 excerpts of record (Informal: no); served on 6/30/97 [97-35010] (gail)
9/3/97	Filed original and 15 copies appellees (Gary Locke, et al.)'s ans brf of 64 pgs + appendix and 5 excerpts of record in 6 vols.; served on 8/25/97 [97-35010] (gail)
9/3/97	Received original and 15 copies intv/aple (National Res Def Cncl, Washington Env Cncl, and Ocean Advocates) brief of 63-pgs (Recvd because brfs are missing proof of service; notified cnsl.) [97-35010] (gail)
2/4/98	ARGUED AND SUBMITTED TO James R. BROWNING, served on 7/31/98 (PANEL AND ALL ACTIVE JUDGES) [97-35010] (gail)

DATE	PROCEEDINGS
8/31/98	Filed order and amended opinion. The panel's opinion, filed on 6/18/98, is amended as follows: (For Complete Text See Order) (FAXED TO CSL AT 2:32 P.M.) (Judges James R. BROWNING, Diarmuid F. O'SCANNLAIN, Alfredo C. Marquez,) (Orig. opinion id: [3472982-1]) [97-35010] (gail)
8/31/98	[3499649] Filed original and 40 copies aplt Intl Assoc of Indep petition for rehearing with suggestion for rehearing en banc 20 p.pages, served on 8/31/98 (PANEL AND ALL ACTIVE JUDGES) [97-35010] (gail)
11/24/98	Filed order (James R. Browning, Diarmuid F. O'SCANNLAIN, Alfredo C. Marquez): The panel has unanimously voted to deny the pet for rhrg. Judge Browning and Judge O'Scannlain have voted to reject the sugg for rhrg en banc, and Judge Marquez so recommends. The full ct was advised of the suggs for rhrg en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused judges in favor of en banc consideration. FRAP 35. The pets for rhrg are DENIED and the suggs for rhrg en banc are REJECTED. (Judge Graber's dissent to denial of pet for rhrg included) (See Order for Full Text.) [3499345-1] [97-35010] (gail)

DATE	PROCEEDINGS
12/2/98	MANDATE ISSUED [97-35010] (jr)
3/18/99	Received letter from the Supreme Court dated 3/15/99 re: ext of time to file pet for writ of cert has been extended to 4/23/99 (Casefile) [97-35010] (gail)

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2:95cv1096

INTERTANKO, *et al.*

v.

LOWRY, *et al.*

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
7/17/95	1	COMPLAINT of Intertanko for declaratory relief and permanent injunction against the enforcement of certain statutes and regulations of the State of WA purporting to regulate operations, manning, and equipment of tank vessels in interstate and international commerce (Summons(es) issued) Receipt # 223757 (gm) [Entry date 07/28/95]
9/19/95	12	ANSWER to complaint [1-1] by defendant Mike Lowry, defendant Christine O Gregoire, defendant Barbara J Herman (gm) [Entry date 09/22/95]
1/25/96	--	PROPOSED Intervenor's Answer by defts Natural Resources Defense Council & WA Environmental Council (gm) [Entry date 01/31/96]

DATE	NO.	PROCEEDINGS
1/25/96	27	ANSWER to complaint filed by Intervening Defts Natural Resources Defense Council & WA Environmental Council [1-1] (gm) [Entry date 01/31/96]
6/3/96	87	MOTION by State defendants for partial summary jgmnt; O.A. REQ'D NOTED FOR 7/19/96 (JOINT APPENDIX FILED IN EXPANDOS) (gm) [Entry date 06/04/96] [Edit date 06/05/96]
6/3/96	89	MEMORANDUM by defendants in support of motion for partial summary jgmnt [87-1] (gm) [Entry date 06/04/96]
6/3/96	102	MOTION by intervenor National Resources, intervenor WA Environ Coun, intervenor Ocean Advocates Inc for summary jgmnt; O.A. REQ'D NOTED FOR 7/19/96 (gm) [Entry date 06/04/96]
6/3/96	103	MEMORANDUM by intervenor in support of motion for summary jgmnt [102-1] (gm) [Entry date 06/04/96]
6/3/96	105	MOTION by plaintiff Intertanko for summary jgmnt; O.A. REQ'D NOTED FOR 7/19/96 (gm) [Entry date 06/04/96]

DATE	NO.	PROCEEDINGS
6/3/96	106	MEMORANDUM by plaintiff Intertanko in support of motion for summary jgmnt [105-1] (FILED IN EXPANDO) (gm) [Entry date 06/04/96] [Edit date 06/05/96]
6/3/96	107	APPENDIX VOLUME I thru IV filed by plaintiff Intertanko re motion for summary jgmnt [105-1] (FILED IN EXPANDOS) (gm) [Entry date 06/04/96]
7/2/96	113	OPPOSTION (RESPONSE) by defendant James H. Krider to motion for summary jgmnt AND JOINDER of "State Defts" OPPOSITION TO Summary Judgment [105-1] (gm) [Entry date 07/03/96]
7/3/96	116	MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE by plaintiff Intertanko to motion for summary jgmnt [102-1] (FILED IN EXPANDO) (gm) [Edit date 07/08/96]
7/3/96	117	MEMORANDUM IN OPPOSITION (RESPONSE) by plaintiff Intertanko to motion for summary judgment [99-1] (FILED IN EXPANDO) (gm) [Edit date 07/08/96]

DATE	NO.	PROCEEDINGS
7/3/96	118	MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE by plaintiff Intertanko to motion for partial summary jgmnt [87-1] (FILED IN EXPANDO) (gm) [Edit date 07/08/96]
7/3/96	119	RESPONSE by intervenor to motion for summary jgmnt [105-1] (gm) [Entry date 07/08/96]
7/3/96	121	RESPONSE by State defendants to motion for summary jgmnt; [105-1] (gm) [Entry date 07/08/96]
7/15/96	131	REPLY by plaintiff Intertanko TO Intervenors RESPONSE to motion for summary jgmnt [105-1] (FILED IN EXPANDO) (gm) [Entry date 07/17/96] [Edit date 07/17/96]
7/15/96	132	REPLY by plaintiff Intertanko TO State Defts RESPONSE to motion for summary jgmnt [105-1] (FILED IN EXPANDO) (gm) [Entry date 07/17/96]
7/15/96	134	REPLY by State Defts TO pltf Intertanko's RESPONSE to motion for partial summary jgmnt [87-1] (gm) [Entry date 07/17/96]

DATE	NO.	PROCEEDINGS
7/15/96	136	REPLY MEMORANDUM by intervenor IN SUPPORT OF motion for summary jgmnt [102-1] (gm) [Entry date 07/17/96]
9/24/96	147	MOTION by intervenor WA Environ Coun to supplement the summary judgment record NOTED FOR 10/11/96 (gm) [Entry date 09/25/96]
9/24/96	148	MEMORANDUM by intervenor WA Environ Coun in support of motion to supplement the summary judgment record [147-1] (gm) [Entry date 09/25/96]
9/24/96	150	SUPPLEMENTAL DOCUMENTS in support of AND IN OPPOSITION to Summary Judgment by intervenor WA Environ Coun to [105-1] (gm) [Entry date 09/25/96]
9/27/96	154	RESPONSE by plaintiff Intertanko to motion to supplement the summary judgment record [147-1] (gm) [Entry date 09/30/96]

DATE	NO.	PROCEEDINGS
9/30/96	156	MINUTE ORDER: by direction of Judge John C. Coughenour GRANTING Intervenors motion to shorten time and accompanying motion to supplement the summary judgment record with additional documents. The documents submitted by intervenors and the documents submitted by pltf with its response to intervenors' motion to supplement are hereby added to the summary judgment record. [147-1] [151-1], (cc: counsel, Judge) (gm)
10/7/96	157	STATEMENT OF ADDITIONAL AUTHORITIES by state defendants (Attachment) (kerr)
10/9/96	159	MINUTES OF ARGUMENT: JCC; Dep. Clerk: Julie Mahnke; CR: Stanley-Knight (Flygare); Attys present Henry Jameson, Jonathan Benner, William Collins, Jeff Needle, Sean Connaughton; cnsl heard. Ct will issue a written decision. (rs) [Entry date 10/10/96]
10/22/96	160	MOTION by plaintiff Intertanko to supplement the record on summary judgment NOTED FOR 11/8/96 (gm) [Entry date 10/23/96]

DATE	NO.	PROCEEDINGS
10/22/96	161	MEMORANDUM by plaintiff Intertanko in support of motion to supplement the record on summary judgment [160-1] (gm) [Entry date 10/23/96]
11/1/96	166	RESPONSE by defendant Mike Lowry, defendant Christine O Gregoire etc to motion to supplement the record on summary judgment [160-1] (dm) [Entry date 11/04/96]
11/18/96	179	ORDER by Judge John C. Coughenour GRANTING pltf's motion to supplement the record on summary judgment [160-1], DENYING dft Krider's motion for summary jgmnt; [105-1] GRANTING dft's & intervenor's motion for summary jgmnt; [102-1] DENYING pltf's motion for summary judgment [99-1], GRANTING dft's motion for partial summary jgmnt; [87-1] This action is hereby DISMISSED and the Clerk of the Court is directed to enter judgment accordingly. Case terminated. (cc: counsel, Judge, JM) (dm)

DATE	NO.	PROCEEDINGS
11/20/96	180	JUDGMENT: by court the motions for summary jgm filed by dfts and intervenors are GRANTED and the motion for summary jgm filed by Intertanko is DENIED. This action is DISMISSED (cc: counsel, Judge, Jgm. Book) Entered on 11/20/96 (rs)
12/11/96	182	NOTICE OF APPEAL by plaintiff Intertanko form Dist. Court decision [179-2, 180] (cc: CCA, JCC, Counsel) (lb) [Entry date 12/14/96]

U.S. Department of Transportation

United States Coast Guard

AUG 25 1993

Ms. Barbara Herman
Administrator
State of Washington
Office of Marine Safety
711 State Ave., NE
Olympia, WA 98504-2407

Dear Ms. Herman:

In previous recent correspondence, I advised you of my concern regarding the application of certain provisions of Washington State law and their application to Canada-bound vessels transiting the Strait of Juan de Fuca. My concern focuses on some actions that may be taken by your office that jeopardize existing or future international treaties and agreements, each of which may be more beneficial overall in protecting the environment. I hope that we can come to a workable solution among all three governments to resolve what I see as a near term conflict between the application of some very important and essentially sound state regulations and longstanding international agreements.

As a legal matter, I would call your attention to the 1979 Canada-United States Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region. Under that Agreement, the Parties have recognized the desirability of compatibility in their respective national regulations bearing on marine safety and environmental protection applicable to vessels using the cooperative vessel traffic management system (CVTMS). Specifically, Canada and the United States have agreed that –

> In applying its regulations to vessels proceeding through its portion of the applicable waters solely en route to or departing from a port of the other Party, will consider compliance with the requirements of the other Party to be effectively equivalent to material compliance with its own requirements, so long as the requirements and enforcement practices of the other Party, in their totality, continue to provide a comparable degree of marine safety and environmental protection.

It is the Coast Guard's opinion that the application of Washington State's regulations regarding vessel oil spill prevention plans to vessels utilizing the (CVTMS) solely en route to or departing from Canada would contravene the 1979 Agreement. As a consequence, such an application would be voided by the Supremacy Clause of the United States Constitution.

While the Coast Guard has a number of authorities, including 33 U.S.C. 1230, which it might exercise in this situation, we would hope to be able to work with your Office during the course of our discussions with the Canadians on the question of appropriate standards and requirements in waters of mutual interest. We understand, in this connection that your Office has authority under the applicable statute and regulations to waive regulation application where there is a legal basis for the waiver. We suggest that the Coast Guard opinion referred to above would provide the legal basis for such a waiver. Certainly such a waiver would assist in avoiding misunderstandings as to the applicability of the State's requirements in contravention of the Agreement, and improve the atmosphere for my discussions with Canada.

You and I share similar goals to act swiftly to protect our waters. To do this, we must work cooperatively with those

who share our waters. Therefore, it is essential that we work carefully and through diplomatic channels. Sometimes this is a slow, deliberate process - but it works. Indeed, we have several initiatives in progress similar to your pollution prevention plans. These include:

1. The proposed "International Management Code for the Safe Operation of Ships and for Pollution Prevention," enclosure (1).

2. Through the International Maritime Organization (IMO) Subcommittee on the Standards of Training and Watchkeeping (STW), we are working on a number of issues for revision to the Standards of Training, Crewing and Watchkeeping (STCW) convention including:

   a. Training and operating procedures for all personnel involved in the operation or navigation of tank vessels;

   b. Human elements such as fatigue and workhour limits;

   c. Proficiency in the English language;

   d. Mandatory vessel reporting schemes;

   e. Simulator training; and

   f. Port-State controls.

We invite you to participate in this and like efforts by attending the SOLAS Working Group on Training and Watchkeeping which is scheduled to meet at the Department of Transportation Headquarters in Washington D.C., on October 14, 1993. We have taken the liberty of adding you to our mailing list; so a package describing the meeting and an agenda will be sent to you in advance.

My staff has advised me that you are interested in working with us to promote Washington State concerns both nationally and internationally. Please find enclosed background information on our work with IMO as well as our national advisory committees. I encourage you to participate in and use these fora and the processes to vet Washington issues to a broader community.

I hope we can resolve these issues soon.

Sincerely,

/s/ A.E. Henn

A.E. Henn
Rear Admiral, U.S. Coast Guard
Chief, Office of Marine Safety,
Security and Environmental Protection

Enclosure

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR

No. C95-1096C

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS
Plaintiff,

vs.

MIKE LOWRY, Governor of the State of Washington, et al.,
Defendants,

and

THE WASHINGTON ENVIRONMENTAL COUNCIL, et al.,
Intervenors.

DECLARATION OF ROBERT BISHOP IN SUPPORT OF PLAINTIFF INTERTANKO

I, Robert Macnair Bishop, declare as follows:

1. I am an employee of INTERTANKO in the capacity of Manager of the Marine & Environment Section. I am at least 18 years of age and am competent to testify on the matters herein, and make this Declaration based on my current personal knowledge, experience, and belief.

2. I am a citizen of the United Kingdom, hold a Master's mariner's certificate and have extensive ship-board experience on a wide variety of vessels, including Dry Cargo Ships, Bulk Carriers, Container Ships and Tankers.

3. In my capacity as Manager of the Marine & Environment Section I regularly represent INTERTANKO at the International Maritime Organization and other fora. I provide information to Members on international legislation affecting tankers, charterers' vetting inspections and Port State Control, and write the monthly Tanker Safety Circular letter. I am currently engaged in providing research into the safe carriage of oil by sea and the ISM Code.

4. I have reviewed a document entitled the Second Affidavit of Stanley J. Norman and have the following comments.

5. The Second Affidavit of Stanley J. Norman contains a number of mis-statements of fact which should be clarified:

a. On page 5, line 22-23, Mr. Norman mistakenly tries to limit the definition of "fleet" in the BAP Regulations to only those vessels that operate in Washington waters. This is incorrect for a number of reasons.

(1) It is impossible and unrealistic for an owner to determine in advance and segregate for compliance purposes, the vessels in his fleet which will be trading to Washington State on account of the nature of the spot market for oil transportation. Cargoes of oil are oftentimes sold after loading on a vessel with a consequent change in the routing of the vessel. As a result, a tanker owner cannot rationally designate only a portion of his entire fleet of vessels as "Washington eligible" and ensure compliance with BAP Regulations for only those vessels. In order to ensure that any vessel in his fleet is capable of responding to any spot demand for a vessel, owners trading to the West Coast of North America will be obligated to comply with the BAP Regulations even

if a particular vessel is not scheduled to call at Washington.

(2) Mr. Norman Himself states the "the intent is to have a universal system for a fleet of vessels to allow owners and operators the flexibility to move trained personnel between vessel without having to retrain them in the three primary functions, navigation, collision avoidance, and administration, for each vessel on which they embark." (Second Norman Affidavit p.61, 1-4). From a safety and efficiency viewpoint (endorsed by Mr. Norman) it is also essential that every vessel in a fleet maintain uniform training and operating procedures. Therefore, Mr. Norman's assertions on page 5 that a fleet owner is only required to adopt Washington's regulations for a portion of his fleet directly contradict his stated desire for uniform procedures on page 6. The Washington standards for any owner who has any expectation of either calling in Washington, or even for owners merely transiting Washington State waters en route to Oregon or Canada, thus become a minimum requirement or lowest common denominator that applies to all of his fleet throughout the world.

b. On page 5, lines 4 through 12, Mr. Norman asserts that WAC 317-21-130, which requires owners and operators of tank vessels which come into Washington waters to report events anywhere in the world, is intended only to collect information and will not be used against a tank vessel owner. Rather, according to Mr. Norman, the information will be used to measure the effectiveness of prevention measures used by the tanker owners in response to events in other areas of the world.

Whatever the use of the data, if a tanker owner fails to comply with this requirement, OMS will (or could) deny entry of a vessel into Washington.

c. On page 5, line 13-14, Mr. Norman asserts that WAC 317-21-130 is consistent with current efforts in the International Maritime Organization ("IMO") to establish reporting requirements. This is not correct. IMO is currently concerned only with accident reporting not inspection or near miss reporting as required by the BAP Regulations. Consequently, a tanker owner would be required by this regulation either to change its reporting procedure for its entire fleet, including those vessels not scheduled to call the State of Washington or to establish a separate reporting protocol for those vessels which may be routed to the State of Washington. Of course, it is impossible to predict with any great certainty which vessels are likely to be routed to any particular port.

d. WAC 317-21-200(2) requires creation of a standardized bridge resource management system for all vessels in a company's fleet. Mr. Norman asserts that these rules only apply to "those vessels that may operate in Washington waters" but also states that the "intent is to have a universal system for a fleet of vessels to allow owners and operators the flexibility to move trained personnel between vessels without having to retrain them" Second Norman Affidavit p.5-6. As is set out above, conditions of the global spot market for oil, which demands that owners have all vessels ready to load oil for delivery to destinations throughout the world, including the State of Washington, do not permit neat segregation of assets by ultimate destination. Therefore, in order for a fleet owner to meet the State of Washington's intent of having the flexibility of trained personnel adequate to

meet any specific state of national requirements, a tanker owner would have to apply Washington's bridge resource management system throughout its entire fleet, whether or not the tanker owner had plans to have a specific vessel call at Washington.

e. A tanker owner will have to apply Washington's regulations regarding crew training, drill programs, record keeping, and management programs across the board throughout its entire fleet whether or not an individual vessel is scheduled to call the State of Washington. The State of Washington's goals of strict international uniformity in the "three primary functions, navigation, collision avoidance, and administration" (Second Affidavit of Stanley J. Norman, p. 6) can only be met by the adoption of the State of Washington's procedures to its operations around the world.

f. As to WAC-317-21-230, which requires implementation of crew training and drill programs, Mr. Norman asserts that "all training and drills can be accomplished within Washington." Second Norman Affidavit, p. 6, 1 10. This statement is, at best, unrealistic. In the first instance, it presupposes that OMS would permit a vessel to enter Washington waters without first having conducted training and drills and then, only after the vessel enters those waters, conduct training drills. This is simply not credible. Further, and more importantly, under the ISM Code, a company will be required to have training programs in line with international requirements and recommendations. Where those drills are at variance to the drills and training programs set out in WAC-317-21-230, there is a subsequent lack of uniformity which defeats the singular purpose of having drills in the first instance - a

uniformed, pre-conditioned response to a given set of emergency conditions. Finally, approaches and departures from ports are the busiest, and potentially most hazardous parts of a voyage. For Mr. Norman to suggest that training and drills could take place during this time is again unrealistic and without doubt a hazard to the environment and safety of the vessel.

g. As to WAC-317-21-260, which requires management systems, it would be unrealistic to expect that a vessel would incorporate the type of systems and procedures required by this BAP Regulation solely while in Washington waters. No INTERTANKO member is headquartered in Washington State. Any management requirements must by its nature be conducted out of state.

h. Mr. Norman attempts to minimize the incongruities between the State of Washington's regulations and international regulations when he states that "Washington hopes that all the BAP standards will eventually be incorporated into international law and therefore the only expense incurred would be to produce and submit a prevention plan." Second Norman Affidavit, page 8 line 11. Mr. Norman's unsubstantiated hopes for the future do not effect of the immediate and substantial impact of the BAP Regulations on current tanker operations.

i. Similarly, Mr. Norman attempts to minimize the cost of compliance. Second Norman Affidavit, p. 7-8. As to the cost of compliance with the BAP Regulations, INTERTANKO asserts that each vessel in its fleet, for the reasons set out above, whether it has immediate plans to call the State of Washington or not, will incur substantial compliance costs even for vessels not scheduled to call at Washington ports. The BAP Regulations also create managerial, administrative, and

personnel costs that are not dependent on port calls in Washington.

j. Mr. Norman mistakenly states that "the U.S. Coast Guard has no mechanism like prevention plans for evaluating compliance of Foreign Flag vessels with management practices and personnel policies." p. 8 line 14-15. The certifications required by various international conventions are precisely for the purpose of enforcing compliance. The Coast Guard checking these certificates is no less valid a way of evaluating a vessel's management and personnel policy as than are Washington's BAP plans.

k. Mr. Norman discusses the BAP Regulations vis-a-vis the SOLAS requirements for emergency towing. Norman Aff. p. 9. The BAP Regulations require that emergency towing equipment be remotely deployable. The federal requirement contains no such standard. Thus, but for the BAP Regulations vessels calling in Washington waters would have to install remotely deployable towing packages.

6. An important concern for INTERTANKO is that the State of Washington could set a precedent by establishing unilateral regulations. Tanker shipping is international. Tanker shipping is regulated in most respects by the UN body of the International Maritime Organization (IMO). If other states within the United States impose similar, or worse yet dissimilar requirements as the State of Washington, that would not only increase the economic burdens, but could soon make the tanker impossible to operate as different States' requirements for the same equipment might not necessarily be the same. The vessel is carefully designed to accommodate for trading to a large variety of different ports of various sizes and navigational environment. Often a tanker changes

destination underway which means that the discharge port is often not known at the time of loading. The crew onboard is replaced at certain intervals and needs to be trained to operate one uniform equipment set and procedures for every tanker. The use of different types of installations, equipment, and procedures will not only be costly and impractical, but may be highly counterproductive to safety and pollution prevention. It is obvious that a crew that needs to react swiftly in an emergency situation will need to be trained on one set of procedures and equipment.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signed at Oslo, Norway on July 13, 1996.

/s/ RM Bishop
Robert Macnair Bishop

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR

No. C95-1096

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,

vs.

MIKE LOWRY, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County; DAVID NEEDY, Prosecutor of Skagit County; JAMES KRIDER, Prosecutor of Snohomish County; and NORMAN MALENG, Prosecutor of King County,
Defendants.

AFFIDAVIT OF MILES KULUKUNDIS IN SUPPORT OF PLAINTIFF INTERTANKO

I, Miles Kulukundis, testify as follows:

1. I am the President of London and Overseas Freighters (Bermuda), Limited ("LOF"). I am at least 18 years of age and am competent to testify on the matters stated herein, and make this affidavit based on my personal knowledge and belief.

2. LOF is incorporated in Hamilton, Bermuda with its main place of business being Bermuda. LOF is the owner of six

tankers. Those tankers, with a combined capacity of 618,006 deadweight tons, are registered in the Port of Lond[illegible], United Kingdom. All are classed with Lloyd's Register of Shipping ("Lloyd's"). All of LOF's tankers comply with applicable British, international, U.S. Coast Guard, and Lloyd's operational, manning, training, equipment and safety requirements.

3. LOF tankers routinely call at terminals and facilities on the west coast of the United States. Recent port calls include: Point Wells, Washington; Willsbridge, Oregon; San Francisco, California; Richmond Long Wharf, California; Martinez, California; Benicia, California; Los Angeles, California; Long Beach, California; El Segundo, California; and Huntington Beach, California. In 1996, LOF has called twice at a terminal on the Columbia River at Point Wells, Washington. In April 1996, the LOF tanker LONDON SPIRIT was boarded and inspected by personnel from the Washington State Office of Maritime Safety (OMS) to assess compliance with the Washington State prevention plan requirements. That vessel was returning from Point Wells and was berthed at Willsbridge, Oregon at the time of the inspection.

4. LOF is currently a member of the International Association of Independent Tanker Owners ("INTERTANKO"), Oslo, Norway. LOF has been a member of INTERTANKO since 1971. All of LOF's tankers are enrolled in INTERTANKO.

5. I served as Chairman of INTERTANKO from May 1994 to May 1995. Other INTERTANKO positions I have held include: Vice Chairman; member of the Executive Committee; member of the INTERTANKO Council; and Chairman of the Worldscale Committee.

6. I participated in the deliberations of INTERTANKO to bring this action. The feeling was widespread within the organization that INTERTANKO is one of the few, if not the only, organization in the world which could protect tanker owners' interests in effective and uniform environmental and safety regulations. As far as I am concerned, INTERTANKO has always promoted rational environmental measures and has worked to oppose unrealistic or ineffective safety measures. INTERTANKO has opposed unilateral and discriminatory safety and environmental regimes that deviate from international standards.

7. Prior to issuance of the regulations challenged in this litigation, LOF had a Best Achievable Protection (BAP) plan developed under WAC 317-20. This plan was approved by OMS on May 13, 1994. LOF could conform with this plan requirement because it was identical to, and indistinguishable from, all contemporary international, national and industry operational, manning, training, equipage and safety requirements. As far as I am aware, this plan was reviewed for completeness but not substance.

8. Under existing charter agreements, LOF anticipates an increased number of calls at terminal facilities in Puget Sound in 1996 and 1997. Consequently, LOF submitted to OMS a BAP plan developed under WAC 317-21. This plan was submitted on November 1, 1995. LOF incorporated into this plan all applicable international, national and industry operational, manning, training, equipment and safety requirements. For those operational, manning, training, equipage and safety specifications and/or procedures required by the new BAP Standards which differ from those required by British, international, U.S. Coast Guard, and Lloyd's authorities, LOF is seeking to comply to the extent practicable and consistent with international and national law. As far as

I am aware, LOF's BAP plan has been reviewed for completeness but not substance.

9. An LOF tanker complying in all respects with applicable international and national laws and otherwise fully qualified to call at ports in other states of the United States may not lawfully call at ports in the State of Washington unless it adopts the unique additional measures required by WAC 317-21.

10. I regard the extraterritorial influence of the management, training, and personnel requirements of the BAP standards as extremely distressing. The measures required under WAC 371-21 apply to LOF's operations at all times no matter where an LOF vessel is located. In other words, compliance with Washington State regulations extends beyond the borders of the State of Washington and the United States and follows LOF's operations throughout the world.

11. LOF has spent approximately $12,000 to develop, file, and maintain a BAP plan under WAC 317-21. Because many of the BAP's distinct operational, manning, training, equipment and safety requirements are being phased-in, the expenses for compliance are on-going. Costs for meeting the BAP training, recordkeeping and management standards have not been calculated but will be substantial.

12. I regard the distinct and overlapping requirements of the BAP standards as a threat to marine safety. LOF trains its personnel, and operates and equips its tankers, to all applicable international and national standards. The imposition of different or peculiar requirements which vary on a port-by-port basis in the United States will generate confusion and misunderstanding among vessel crews and management. This is the reason why uniform and consistent international and national requirements are so critical.

I declare under penalty of perjury that the foregoing is true and correct.

Signed at London on 31 May, 1996

/s/ Miles Kulukundis

Miles Kulukundis

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR

No. 095-1096

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,

vs.

MIKE LOWRY, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County; DAVID NEEDY, Prosecutor of Skagit County; JAMES KRIDER, Prosecutor of Snohomish County; and NORMAN MALENG, Prosecutor of King County,
Defendants.

DECLARATION OF RICHARD T. DU MOULIN IN SUPPORT OF PLAINTIFF INTERTANKO

Richard T. du Moulin, having been duly sworn, testifies as follows:

1. I am Chairman and Chief Executive Officer of Marine Transport Lines, Inc. ("MTL"). MTL is a Delaware Corporation and its corporate office are located at 1200 Harbor Boulevard in Weehawken, New Jersey.

2. Through directly or indirectly owned subsidiaries, MTL owns 5 tankers which it operates in commercial trades.

Through a directly owned subsidiary, MTL also operates 5 tankers for third parties. The tankers owned and or operated by MTL have an aggregate deadweight capacity of 514,006 metric tons and are registered in the United States, Liberia or Panama. All of MTL's tankers are classed with the American Bureau of Shipping and each complies with applicable national and international classification, operational, manning, training, equipment and safety requirements.

3. In 1994, one of MTL's tankers made a single call to the state of Washington and in 1995, one of MTL's tankers called upon the state of Washington twice. During the first five months of 1996, one of MTL's tankers made one call to Washington state. The tankers which called upon Washington state carried crude oil, molten sulphur, chemicals, anhydrous ammonia and petroleum products to the port of Kalama. MTL's tankers also routinely call at terminal facilities located in California, Texas, Lake Charles, the Mississippi River, Florida, North Carolina, Philadelphia and New Jersey.

4. MTL is currently a member of the International Association of Independent Tanker Owners ("INTERTANKO"), Oslo, Norway and has belonged to INTERTANKO since approximately 1982. All of MTL's tankers are enrolled in INTERTANKO.

5. I was elected Chairman of INTERTANKO in May of 1996. Prior to becoming INTERTANKO's chairman, I served as INTERTANKO's Vice Chairman, a member of its Executive Committee and a member of the INTERTANKO council.

6. I participated in the careful deliberations of INTERTANKO which led to the commencement of this action. Consistent with its mandate to promote, on a global basis, the interests of tanker owners and tanker operators, INTERTANKO believes that its members, as well as the ports

upon which their vessels call, are entitled to effective, comprehensive and uniform environmental and safety regulations. Given its broad based membership, INTERTANKO believes that it is particularly well qualified to advance these goals. It is my belief that INTERTANKO has always promoted rational measures to protect the environment while working to oppose unrealistic or poorly crafted safety measures. INTERTANKO has been especially concerned over safety and environmental regimes which deviate from uniform international standards and has devoted particular effort to oppose them.

7. Prior to issuance of the regulations challenged in this action, MTL develpoed a BAP plan as required by WAC 317-20 (the "WAC 20 Plan") which was approved by the Washington State Office of Marine Safety (OMS). Because the WAC 20 Plan approved by the state of Washington was based upon the governing international, national and industry operational, manning, training, equipage and safety requirements by which its tankers are bound, MTL experienced little difficulty in meeting the requirements of the WAC 20 Plan. It is my understanding that the WAC 20 Plan was reviewed for completeness but that an analysis of its substantive content was never undertaken.

8. Under the terms of the charter parties by which MTL's tankers are employed, each tanker must be qualified for the worldwide carriage of liquid bulk cargoes, including the carriage of such cargoes to the State of Washington. To be certain that MTL's tankers may be gainfully employed, MTL submitted to OMS a BAP plan developed under WAC 317-21 (the "WAC 21 Plan"). Incorporated into the WAC 21 Plan were all applicable international, national and industry operational, manning, training, equipment and safety requirements. To the extent that the operational, manning,

training, equipage and safety specifications and procedures required by the WAC 21 Plan differ fform those required by the respective registries of MTL's tankers and the governing international, U.S. Coast Guard, and classification requirements, MTL is seeking, to the extent practicable, to comply with well established norms of national and international law. It is my understanding that the WAC 21 Plan was reviewed for completeness but that an analysis of its substantive content was never undertaken.

9. Notwithstanding perfect compliance with all applicable national and international laws, no MTL tanker may lawfully call upon ports located within the State of Washington unless each such tanker has adopted the unique additional measures prescribed by WAC 317-21.

10. The management, training, and personnel requirements arising from BAP, and the extraterritorial application of those of requirements by the state of Washington, are of extreme concern to me. It is my understanding that the measures required by WAC 317-21 apply to MTL's operations at all times, regardless of the location of a MTL vessel. This means that the regulations of Washington State extend beyond its borders, beyond the borders of the United States and follow each of MTL's tankers as they trade anywhere in the world!

11. MTL has spent a substantial sum to develop, file and maintain the WAC 21 Plan. As MTL phases in BAP's distinct operational, manning, training, equipment and safety requirements, the expense of compliance will increase. For example, one MTL tanker is currently scheduled to be fitted in September with a $50,000 towing arrangement which complies with WAC 317-21-265(2). The cost of installation will be at least $30,000. The cost of meeting the BAP training, record keeping and management standards will also be substantial and ongoing.

12. I consider the distinct, confusing and overlapping requirements arising from BAP to constitute a material threat to the well established and time tested standards which govern marine safety on a worldwide basis. MTL has a long history of strict and comprehensive compliance with all applicable national and international standards in the training of its personnel, the design of its vessels, the equipment with which they are provided and the manner in which they are operated. Despite its good faith concerns for safety and the environment, I believe that the imposition by the state of Washington of different, peculiar or inconsistent requirements is almost certain to generate precisely the kind of confusion and misunderstanding which the current national and international regimes were created to avoid. This confusion and misunderstanding can only have negative consequences.

I declare under penalty of perjury under the laws of the State of New Jersey that the foregoing is true and correct.

Signed at Weehawken, New Jersey on May 30, 1996.

/s/ Richard T. du Moulin
Richard T. du Moulin

STATE OF WASHINGTON

OFFICE OF MARINE SAFETY

September 15, 1995

Chronos Shipping Co., Ltd.
41 Akti Miaouli
185 35 Piraeus, Greece

Re: WASHINGTON STATE OIL SPILL PREVENTION PLAN REQUIREMENTS

Dear Sirs:

On August 24, 1995, the tank vessel ASPHALT CHAMPION entered Washington waters en-route to Portland, Oregon. Washington state rules require tank vessels to submit an Oil Spill Prevention Plan before entering Washington waters. To date, the Office of Marine Safety has not received a prevention plan for the ASPHALT CHAMPION. Enclosed is a Notice of Determination regarding this violation.

We note on January 27, 1994, MARISPOND Inc. submitted a minimum compliance prevention plan to OMS for the ASPHALT CHAMPION and other tank vessels that your company operates. On July 7, 1995 Washington State Oil Spill Prevention Plan rules became effective and required tank vessel owners to submit new prevention plans. Also at this time OMS mailed out a copy of the final rules and a copy of the model prevention plan for tank vessels to all companies that submitted minimum compliance prevention plans.

Under the Revised Code of Washington (RCW) 88.46.040, 88.46.80 and Chapter 317-21-020 Washington Administrative Code (WAC) the owner of a tank vessel is required to submit a Oil Spill Prevention Plan before the vessel enters Washington waters. On September 6, 1995 an inspector from

this office contacted the vessel's Master and Agent to discuss prevention plan submission requirements. Our prevention plan rules contain Best Achievable Protection standards that tank vessels must comply with when operating in Washington waters. Enclosed are copies of RCW 88.46 and Chapter 317-21 WAC. Also enclosed is a Model Oil Spill Prevention Plan for Tankers.

If you have any questions or require assistance, please contact me at (503) 229-6541, fax (503) 229-6954.

Sincerely,

/s/ John Jenicek
John Jenicek
Field Office Supervisor

Enclosures

cc: Rebecca Vandergriff, Assistant Attorney General
Crossway Navigation
MARISPOND
USCG Marine Safety Office Portland
Sunrise Shipping (Portland)

Office of Marine Safety
Olympia, Washington

No. CR-95-001

Date of Issuance: 09/15/95
Vessel Name: ASPHALT CHAMPION
Lloyd's Number: 7329699

NOTICE OF DETERMINATION

TO: Chronos Shipping Co., Ltd.

Address: 41 Akti Miaouli, 185 35 Pireaus, Greece

The Office of Marine Safety (OMS) has determined that you, as owner or operator of the M/V ASPHALT CHAMPION have violated, are violating, or created a substantial potential to violate the provisions of Chapter 88.46 Revised Code of Washington (RCW) as described below. Upon receipt of this Notice of Determination, Chronos Shipping Co., Ltd. has 30 days under RCW 88.46.070 to submit a full, written report to the Office of Marine Safety, stating what steps you have taken or are taking, or both, to comply with this Notice. See RCW 88.46.070(2).

Failure to timely or adequately respond to this Notice may result in an Administrative Order requiring compliance or assessing penalties or both.

DETERMINATION:

The vessel ASPHALT CHAMPION entered Washington waters on September 6, 1995. The vessel is certified by the flag state of Malta to carry oil in bulk as cargo and, therefore, meets the definition of a tank vessel under the Washington Administrative Code (WAC) 317-05-020(21). Under the Revised Code of Washington (RCW) 88.46.040, 88.46.080 and WAC 317-21-020, the vessel's owner or operator was required to submit an Oil Spill Prevention Plan demonstrating

compliance with Best Achievable Protection standards for the ASPHALT CHAMPION to the Office of Marine Safety prior to the vessel entering Washington waters. The Office of Marine Safety had no prevention plan on file for this vessel prior to its entry into Washington waters.

Within 30 days of receipt of this Notice submit the following to Office of Marine Safety:

- A written report, in English, describing how you intend to comply with Chapter 317-21 WAC. The submission of an Oil Spill Prevention Plan, demonstrating compliance with best achievable protection standards, will satisfy this requirement.

By the authority granted Barbara Herman,
Director, Office of Marine Safety

/s/ John Jenicek
Field Office Supervisor, Columbia River

U.S. Department of Transportation

United States Coast Guard

JUN 22 1995

Ms. Barbara Herman
Administrator
State of Washington
Office of Marine Safety
711 State Avenue NE
P.O. Box 42407
Olympia, WA 98504-2407

Dear Ms. Herman:

I am happy to note that the Memorandum of Agreement (MOA) on oil pollution, prevention and response, between the Coast Guard and the State of Washington, was signed by the Commander, Thirteenth Coast Guard District and your Governor an April 24, 1995. This agreement now lays a solid foundation upon which the State of Washington and the Thirteenth Coast Guard District can build a partnership to minimize duplicative efforts, leverage resources, and eliminate existing or potential barriers to trade. I strongly encourage a continuation of the on-going cooperative dialogue with the Thirteenth Coast Guard District in order to most effectively pursue our mutual goals of marine safety and environmental protection.

I would also like to take this opportunity to further our discussion from our meeting of December 16, 1994 and clarify some of my concerns with your letter of April 19, 1995. In that letter, you reference a Coast Guard quote supporting state's rights. The referenced quote also stated, in part, "We must, however, also be mindful of our international agreements". This applies not only with our bilateral agreements with Canada on vessels in U.S. waters, as a result

of the Cooperative Vessel Traffic Management Agreement, but also with equipment, construction, manning, licensing and other existing regulations and initiatives, including those of the International Maritime Organization. Many U.S. statutes and regulations enforced by the Coast Guard are in furtherance of our international commitment. Should widely disparate state requirements be implemented, the possibility arises that compliance with federal and state regulations either becomes a physical impossibility or the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. A patchwork of differing and conflicting coastal state and local regulatory initiatives would be confusing to the users and may actually degrade maritime safety and environmental protection.

While section 1018 of the Oil Pollution Act of 1990 (OPA 90) states that nothing in OPA 90 or the Act of March 3, 1851, shall be construed as preempting the authority of any state from imposing any additional liability or requirements respecting the discharge of oil or any removal activities, the Coast Guard does not regard this as a Congressional expression altering the traditional relationship between federal and state governments. Rather, it permits states to impose additional liabilities or requirements with respect to the discharge of oil or removal activities in connection with a discharge within the State of Washington in a manner that does not contravene the federal scheme. Thus, I continue to believe that most standards which apply to vessels trading internationally or between states remain the responsibility of the federal government. It does not give the State of Washington any additional power or authority that did not exist prior to the passage of the act.

In addition, I do not share your opinion that federal and international regulations are "minimal". In my view, current

standards, and the processes in place to develop and improve these standards, reflect decades of practical experience and the current state of usable technology and produce a high level of safety for today and will meet the challenges of the future.

In response to Presidential direction, the Coast Guard is conducting a detailed review of all our existing regulations. One of the goals of this effort is to increase consistency by aligning our regulations to the greatest degree possible with existing international standards. Similar efforts in Washington State would be appreciated.

The door of the Coast Guard is always open. My headquarters program managers continue to provide guidance and comments to the Thirteenth Coast Guard District on Washington State initiatives. I urge the closest possible alignment of state regulatory efforts with federal and international standards and initiatives. I strongly encourage routine meetings between yourself and your staff, and Admiral Lockwood and his staff at the Thirteenth Coast Guard District in Washington State. I firmly believe that, during these periods of scarce resources, there is more than adequate room on the waterfront for many agencies to work cooperatively and leverage our resources for the benefit of the public. By doing so, we can build on each others successes.

Sincerely,

/s/ J.C. Card

J.C. CARD
Rear Admiral, U.S. Coast Guard
Chief, Office of Marine Safety,
Security and Environmental Protection

Memorandum

U.S. Department of Transportation

United States Coast Guard

Subject: REVIEW OF CALIFORNIA OIL SPILL PREVENTION AND RESPONSE ACT

Date: 30 JAN 1991
16455

From: Chief Counsel

Reply to: G-LMI 7-1527
Attn of: Mr. Presley

To: Chief of Staff

1. As you requested I have reviewed the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act ("OPRA") enacted by the California Legislature during its last session. OPRA is one of the several State oil pollution statutes which have been enacted in the aftermath of the Exxon Valdez incident. It provides a good example of the ways in which States are extending the exercise of their police powers to protect their citizens from oil pollution and its effects.

2. The Coast Guard's interest in such State statutes stems primarily from the way in which the regulatory and enforcement regimes which they create, conflict or complement related regimes administered by this agency. A major consideration in this regard is whether the Federal Preemption Doctrine restricts States' authority to regulate conduct or carry out enforcement in particular areas. In the course of similar review of an emergency order issued by the Alaska Department of Environmental Conservation, this Office prepared a Legal Memorandum, attached herewith as Enclosure (1), a portion of which set out the law relating to the Federal Preemption Doctrine.

3. Enclosure (1) sets out a "two tier" analytical approach to the issue of Federal preemption, based largely on principles discussed in *Ray v. Atlantic Richfield,* 98 S.Ct. 988 (1978), and *Chevron v. Hammond,* 726 F.2d 483 (1984). Enclosure (2) builds on Enclosure (1), setting out a model which may be applied to the provisions of any State oil pollution statute. Specific provisions of OPRA are then analyzed within the model, demonstrating thereby the manner in which the Federal Preemption Doctrine has constrained, or may be expected to constrain, the exercise of the State's police powers.

/s/ P.E. Versaw
P.E. VERSAW

Encl: (1) G-L Memo 16451/16601 of 6 Jul 89

(2) Application of the Federal Preemption Doctrine to State Oil Pollution Statutes; an analytical model

APPLICATION OF THE FEDERAL PREEMPTION DOCTRINE STATE OIL POLLUTION STATUTES: AN ANALYTICAL MODEL

Introduction

In the aftermath of the *Exxon Valdez* incident, a number of States have enacted statutes which establish, or revise existing, laws dealing with oil pollution prevention, preparedness, response (including response financing), liability, and compensation.

This memorandum sets out a model by which the legal impact and relationship of those laws to related Federal laws administered and enforced by the Coast Guard may be measured. It builds upon a detailed memorandum ("G-L memo") prepared by the Chief Counsel of the Coast Guard (file no. 16451/16601, dated 6 July 1989) which examined an emergency order issued by the Alaska Department of Environmental Conservation following the grounding of the *Exxon Valdez*. It takes account of the effect of the recently enacted Oil Pollution Act of 1990 (OPA90), Public Law 101-380, and applies the model to the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act (OPRA) enacted by California in September 1990.

I. THE ANALYTICAL MODEL

General. The model consists of three parts: (A) Whether the State statute being examined contains elements which, *per se*, are preempted by Federal law, or, which could be implemented in a manner which could result in application of the preemption doctrine; (B) Whether the elements which could be implemented in a manner which could result in preemption are limited by provisions specifically designed to avoid that result; and (C) Whether provisions designed to

avoid preemption or otherwise accommodate Federal law give rise to additional legal complications.

Part A - DOES THE STATE STATUTE CONTAIN ELEMENTS WHICH EITHER (1) ON THEIR FACE ARE PREEMPTED BY FEDERAL LAW OR (2) COULD BE IMPLEMENTED IN A MANNER WHICH COULD RESULT IN THE APPLICATION OF THE PREEMPTION DOCTRINE?

At the outset, it must be recognized that there is a general bias against invocation of the preemption doctrine where federal and state oil pollution statutes are in tension. In *Askew v. American Waterways Operators, Inc.*, 93 S.Ct. 1590 (1973) (analyzing a Florida pollution statute), the Supreme Court called attention to the principle "that sea-to-shore pollution [is] historically within the reach of the police power of the States", at 1601. A short time later the Court in *Ray v. Atlantic Richfield Co.*, 95 S.Ct. 988, 994, (1978) (analyzing a Washington pollution statute) noted, " 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " (Quoting from *Rice v. Santa Fe Elevator Corp.*, 97 S.Ct. 1146, 1152 (1947)).

Applying that principle, the Court has devised a "two tier" analytical approach. The "first tier" looks to "whether Congress has either explicitly or implicitly declared that the States are prohibited from regulating" the subject matter in question. *Ray* at 994. The implication referred to may be drawn in several ways. Again drawing from *Ray's* reference to *Rice*: " 'The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for States to supplement it. ... Or the Act of Congress may touch a field in which the federal interest is so

dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. ... Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose' ". *Ray* at 994. As to the last point, however, see *Florida Lime & Avocado Growers, Inc. v. Paul,* 83 S.Ct. 1210 (1963), as quoted in *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 497 (1984), " 'The test of whether both federal and state regulations may operate, or the state must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.' "

The G-L memo describes the "second tier" as "even if Congress has not entirely displaced State regulation over the matter in question, State law is still preempted to the extent that it actually conflicts with Federal law, [citation omitted], or where the State law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. [citation omitted]." See *Ray* at 994.

-- First tier example

In *Ray*, the Supreme Court applied the *explicit* pronouncement of Congress set out in 46 U.S.C. 215 and 364 (currently 46 U.S.C. 8501 and 8502) relating to pilotage, and held: (1) that the State (Washington) law requiring enrolled (i.e. those operating in the coastwise trade) tankers to take on State licensed pilots was invalid, and (2) that the State was free to require tankers operating on registry (i.e. those operating in the foreign trade) to take on such pilots. *Ray* at 995.

The Court continued this first tier analysis and by considering the *implication* to be drawn from the comprehensive nature of the Tank Vessel Act, 46 U.S.C.

391a (currently 46 U.S.C. Chapter 37) concluded that "[t]he Supremacy Clause [of the Constitution] dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment" and that "Congress anticipated the enforcement of federal standards that would pre-empt state efforts to mandate different or higher design requirements." *Ray* at 998.

On the other hand, the Court explained, "Similar in its nature to a local pilotage requirement, a requirement that a vessel take on a tug escort when entering a particular body water is not the type of regulation that demands a uniform national rule." *Ray* at 1005.

-- Second tier example

The G-L memo called attention to the conflict between a requirement to be imposed by the Alaskan Emergency Order under review and existing Coast Guard regulations relating to vessel communications issued under the Port and Waterways Safety Act. One of the directives in the Emergency Order, designed to improve pollution response capability, would require "the Alyeska Marine Terminal to *maintain direct radio contact* with the bridge of each inbound/outbound tanker, accompanying tugs, and Alyeska's oil spill response vessels *while an incoming or outgoing tanker is located at any point between the terminal and Hinchinbrook Entrance."*

The G-L memo then noted that a number of Prince William Sound Vessel Traffic Service regulations at 33 CFR Part 161 address radio communication requirements. The memo concluded that the State requirement might adversely impact on safe navigation in Prince William Sound, the purpose underlying the Federal regulations due to the following conflicting impacts:

a) the difficulty for the vessel to monitor a frequency in addition to that required for the Vessel Traffic Center;

b) the resultant background noises on the bridge affecting concentration; and

c) the practical limitations imposed on a master's ability to respond quickly to an incident by the need to make multiple reports.

Part B - ARE THE ELEMENTS OF THE STATE LAW WHICH COULD BE IMPLEMENTED IN A MANNER SO AS TO RESULT IN PREEMPTION LIMITED BY PROVISIONS SPECIFICALLY DESIGNED TO AVOID THAT RESULT?

The U.S. Court of Appeals for the Ninth Circuit, in *Chevron U.S.A., Inc. v. Hammond,* 726 F.2d 483 (1984), had before it an Alaska statute prohibiting the discharge of ballast water from tankers into the waters of Alaska. Plaintiffs asserted that the State statute conflicted with Federal law in a number of ways. While the court rejected those arguments with respect to one regulatory area (Coast Guard regulations prohibiting certain tankers from storing ballast in cargo tanks unless required by emergency weather conditions); the court took pains to explain, "No party asserts that it is physically impossible to comply with both the Alaska statute and the relevant Coast Guard regulations. Furthermore, *the Alaska statute was amended in 1980 to make it clear that it would not apply in cases where safety reasons dictated non-compliance.*" (Emphasis added.) *Hammond* at 499.

The principle to be applied in this part of the model is found in *Hammond* at 496 where the court quoted from *Merrill Lynch, Pierce, Penner & Smith v. Ware,* 94 S.Ct. 383 390 (1973), which itself was quoting from *Silver v. New York Stock Exchange*, 83 S.Ct. 1246, 1259 (1963), "Moreover state

law should be preempted " 'only to the extent necessary to protect the achievement of the aims of the [federal act in question].' " Consequently, substantial weight should be given to any provisions in a State statute which actually accommodate the otherwise preemptive effect of the superior Federal Law.

Part C - MAY THE PROVISIONS DESIGNED TO AVOID PREEMPTION OR OTHERWISE TO ACCOMMODATE FEDERAL LAW GIVE RISE TO ADDITIONAL LEGAL COMPLICATIONS?

States' attempts to avoid the effects of preemption or otherwise to accommodate their laws to the Federal regime, either by cross references to Federal requirements or by a deferral to Federal action, must be examined. Sometimes State legislatures are not familiar with the applicable provisions of the Federal statutes and regulations to which they refer or defer in laws they enact. While this part of the model is not directly concerned with the application of the Federal Preemption Doctrine it is useful to be aware of inappropriate references so as to be prepared for the problems which may arise when States attempt to implement such laws.

An example of an inappropriate reference which has appeared a number of times in various state oil pollution liability statutes or their implementing regulations concerns financial responsibility requirements. While, Federal oil pollution financial responsibility requirements do not preempt similar requirements imposed by states as a *legal* matter, vessel insurers have traditionally been reluctant to certify insurance coverage against State oil pollution liability. Consequently, as a *practical* matter some States were willing to accept certification in accordance with the requirements of subsection (p) (recently superseded by OPA 90) of section 311. Federal Water Pollution Control Act (FWPCA) as

meeting the State law imposed requirement for coverage of such liability. Such reliance was, of course, illusory. The financial responsibility required under section 311 (p) FWPCA was limited to the coverage of section 311's prescribed liability for *Federal* removal costs. In the event of an oil pollution incident, States and their citizens which relied on this Federal certification would have found themselves without protection. More importantly, litigation to recover costs and damages pursuant to State liability regimes might well have complicated recovery for Federal removal costs under Federal regimes.

APPLICATION OF THE MODEL TO RELEVANT FEDERAL LAWS

General. In applying a first tier analysis under Part A of the model described above, it would be useful to keep in mind some of the Federal statutes whose provisions may be commonly expected to bear upon the question of preemption as applied to State oil pollution laws. For this purpose the relevant Federal statutes fall into the following categories:

a) those which by their terms explicitly preclude State regulation in the same area;

b) those which, by themselves or in conjunction with others, demonstrate an implicit Congressional intent to preclude State regulation in the same area.

c) those which by their terms explicitly express a Congressional intent *not* preclude State regulation in the same area; and

d) those which neither explicitly nor implicitly demonstrate a Congressional intent to preclude or not to preclude State regulation in the same area.

Second tier analysis ("where compliance with Federal and State regulations is a physical impossibility" or the State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") is not necessary except for those statutes within categories (c) and (d) above. The specific terms of the federal laws in those categories and State law provisions must be examined, and, only when there is an "irreconcilable conflict between the Federal and State standards" will that specific State law provision be preempted. (See the G-L memo for citations to the references within quotation marks.)

The Federal statutes which most often may be expected to relate to State oil pollution statutes are the following:

[NOTE: this list should not be considered to be exhaustive. It focuses on those statutes whose provisions are most directly related to provisions of the California Statute currently being examined.]

i) Subtitle II of title 46 U.S. Code;

ii) Port and Waterways Safety Act, (33 U.S.C. 1221 *et seq.*);

iii) Federal Water Pollution Control Act, Section 311 FWPCA, (33 U.S.C. 1321);

iv) Oil Pollution Act of 1990, Title I (33 U.S.C. 2701 *et seq.*).

(i) Subtitle II of title 46 U.S. Code

This law deals with a broad range of merchant vessel and vessel personnel regulation. As noted above, the decision in *Ray* addressed the question of pilotage and tanker construction and design standards.

Pilotage

The provisions of this subtitle concerned with pilotage fall within *category (a)* (with respect to enrolled vessels) and *category (c)* (with respect to vessels under registry and foreign vessels.)

Tanker Construction and Design

The provisions of this subtitle concerned with tanker construction and design fall within, *category (b)*.

Vessel Equipment for Safety

The provisions of this subtitle concerned with safety requirements for equipment have not been addressed by the courts. However, equipment safety regulation pursuant to the Ports and Waterways Safety Act was referred to in *Ray* where the Court found an implied Congressional intent to preclude state regulation. Consequently, it is probable that provisions of subtitle II concerned with equipment regulation and requirements for the purpose of promotion safety, fall within *category (b)*.

Vessel Personnel Qualification and Competence

The provisions of subtitle II concerned with vessel personnel qualification and competence have, similarly, not been addressed by the courts as to their preemptive effect. However, a strong argument can be made that vessel personnel qualification and competence regulation has been traditionally viewed as exclusively within Federal competence. Furthermore, the same considerations requiring exclusivity in vessel safety regulation referred to in *Ray*, would apply in this area as well. Finally the extent to which the Coast Guard has exercised its regulatory authority in this field with Congress' acquiescence leads to an implication of Congressional intention that this area should be solely the

province of Federal regulation. As a consequence it is reasonable to conclude that the provisions of subtitle II concerned with vessel personnel and competence fall within *category (b)*.

(ii) Ports and Waterways Safety Act

As explained in the G-L memo, the Ports and Waterways Safety Act places the Federal government in the primary role insofar as vessel safety is concerned.

Vessel Equipment and Navigation for Safety

The statute provides authority for vessel navigational regulation, including size limitation. In *Ray*, at 1002, the Court expressed the view that Washington's statutory limit on tanker size was invalid due to the authority provided, and in fact exercised, under the predecessor statute to the Port and Waterways Safety Act. The Court reasoned that this was the case even though there was no specific conflict between the Coast Guard's regulation and the applicable state statute.

It was enough that Congress had provided broad authority and responsibility to consider all interests and to assure consistency in prescribing the necessary regulatory regime. The Coast Guard's execution of this authority was sufficient to oust the State of its competence to regulate in the field. Language in *Ray* makes it clear that this principle applies to vessel equipment as well as vessel navigation. Therefore, it is clear that the provisions of the Act authorizing regulation of vessel equipment and navigation for safety purposes fall within *category (b)*.

Structural Safety

There are two areas where parallel State regulatory authority is preserved under the Port and Waterways Safety Act. By its own terms the Act authorizes State regulation of

structure safety. These provisions therefore fall within *category (c)*.

Tug Escorts

The one area where the *Ray* decision, at 1005, found that the *States have retained the authority* to prescribe vessel related requirements concerns *tug escorts*.

(iii) Federal Water Pollution Control Act, Section 311 FWPCA, (33 U.S.C. 1321)

Matters subject to regulation under section 311 FWPCA are:

a) the prohibition of oil and hazardous substance discharges;

b) discharge notification requirements;

c) the authorization to undertake response measures and to obtain judicial assistance where necessary;

d) the organization of response activities (contingency plans, response units, response groups, area committees, etc.);

e) liability relating to the discharge of oil or hazardous substances;

f) methods and procedures for removal of discharged oil and hazardous substances;

g) criteria for local and regional contingency plans;

h) procedures, methods, and equipment and other requirements for equipment to prevent, contain and remove discharges of oil and hazardous substances;

i) the inspection of vessels, removal equipment, and cargoes of oil; and

j) tank vessel and facility response plan requirements.

As amended by OPA90, section 311(o)(2) FWPCA provides:

> (2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State, or with respect to any removal activities related to such discharge.

Consequently, all of the provisions of section 311 FWPCA fall within *category (c)*.

(iv) Oil Pollution Act of 1990, Title I (33 U.S.C. 2701, et seq.)

Title I of OPA90 applies to the following areas:

a) oil pollution liability;

b) funding for compensation for providing response financing and supplementary compensation for costs and damages related to oil pollution;

c) compulsory financial responsibility for liability prescribed under this title.

Section 1018 of OPA90 provides that nothing in the Act shall affect or be construed or interpreted as preempting the authority of any State or political subdivision from imposing any additional liability or requirements respecting the discharge of oil or other pollution by oil within such State or any removal activities in connection with such a discharge. Similarly, a clear disclaimer of preemption is set out with respect to State funds and criminal and civil sanctions prescribed under State law relating to the discharge or substantial threat of a discharge of oil.

Consequently the provisions of title I of OPA90 fall within *category (c)*.

[NOTE: Section 1018 of OPA90 refers to "this Act" in its disclaimer of preemption. Since OPA90 in other titles amends a number of provisions of subtitle II of title 46 U.S. Code, there may be some concerns that Congress intended to affect the preemption situation relating to those provisions as well. However, the provisions of section 1018 apply only to: the discharge or substantial threat of oil or other pollution, removal activities, and funds. These matters are *not* the subject of any provision of subtitle II amended by sections in other titles of OPA90; therefore, Section 1018 does not apply to those amendments.]

Summary of Model

Part A - Does the State statute contain elements which either (1) on their face are preempted or (2) could be implemented in a manner which would result in preemption?

First tier: What is the Federal statute which is most relevant to the State statute being examined? What is the category of that Federal statute?

Second tier: If a category (c) or (d) Federal statute is relevant, is there or could there be a direct conflict between the State statute or its implementation and the Federal Statute and its implementation?

Part B - Are the elements of the State law which could be implemented in a manner so as to result in preemption limited by provisions designed to avoid that result?

Part C - May the provisions designed to avoid preemption or otherwise accommodate Federal law give rise to additional legal complications? (Are there other legal complications of interest to the Coast Guard?

II. APPLICATION OF ANALYTICAL MODEL TO THE CALIFORNIA STATUTE

Introduction

The analytical model described above now will be applied to the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act (OPRA) recently enacted by California. Reference is made only to those provisions of OPRA which may give rise to questions concerning the application of the Federal Preemption Doctrine, specifically with respect to the Federal statutes listed in Part I. The provision to be examined will be identified together with its subject matter, followed by the application of the model. For purposes of simplicity the provision will be identified by the indicated section or article number rather than by its specific location in the Codes of California.

Section 8670.7 - Administrator's Authority Respecting Response

Part A - Answer to question: Possible preemption.

First tier: Relevant Federal statute - section 311 FWPCA [category (c)].

Second tier: Possible conflict if Administrator uses dispersant without Federal approval.

Part B - Answer to question: Yes, Administrator must consult with and cooperate with Federal On Scene Coordinator

Part C - Answer to question: No other complications.

Section 8670.9 Administrator To Develop Compact With Other States

Part A - Answer to question: Possible preemption.

First tier: Relevant Federal statutes: Section 311, FWPCA [category (c)], and Ports and Waterways Safety Act (vessel safety and traffic) [category (b)].

Second Tier: Possible conflict if compact seeks to regulate.

Part B - Answer to question: Yes, Administrator must coordinate development of the compact with the Coast Guard.

Part C - Answer to question: No other complications.

Section 8670.10 - Administrator To Conduct And Set Standards For Drills

Part A - Answer to question: Possible preemption.

First tier: Relevant Federal statute: Section 311, FWPCA [category (c)].

Second tier: Possible conflict if standards conflict with Federal standards.

Part B - Answer to question: No.

Part C - Answer to question: No other complications.

Section 8670.16 - Administrator To Promote Federal Adoption of Laws

Part A - Answer to question: No preemption.

First tier: Relevant federal statute: Ports and Waterways Safety Act (vessel equipment and traffic) [category (b)].

Second tier: Not applicable as no conflict.

Part B - Answer to question: Yes, Administrator limited to pressing Federal government to adopt regulations or statutes.

Part C - Answer to question: No other complications.

Section 8670.17 - Administrator to Regulate Vessels Indirectly Through Terminals

Part A - Answer to question: Possible preemption.

First tier: Relevant Federal statutes - Ports and Waterways Safety Act (equipment and operation of vessels) and subtitle II of Title 46 U.S. Code (equipment and personnel of vessels) [both category (b)].

Second tier: Possible conflict (tug escort) [NOTE: This section of OPRA contains authority to impose tug escort requirements. As noted above, the Supreme Court in *Ray* held that States were not preempted from imposing such requirements. However, a second tier analysis might result in preemption where such a requirement conflicts with a Coast Guard regulation specifically addressing tug escort.]

Part B - Answer to question: No.

Part C - Answer to question: No other complications.

Section 8670.18 - Administrator To Evaluate Coast Guard Inspection Program

Part A - Answer to question: Possible preemption.

First tier: Relevant Federal statutes: Section 311, FWPCA [category (c)]; subtitle II of Title 46 U.S. Code [category (b)].

Second tier: Possible preemption if Administrator adopts conflicting inspection requirements.

Part B - Answer to question: Yes, Administrator must consult with Coast Guard concerning State inspection and may not duplicate Coast Guard activities.

Part C - Answer to question: No other complications.

Section 8670.20 - Tanker Or Barge Disability Notification To Coast Guard

Part A - Answer to question: No preemption.

First tier: Relevant Federal statutes: Section 311, FWPCA [category (c)]; subtitle II of Title 46 U.S. Code [category(b)].

Second tier: Not applicable as no conflict.

Part B - Answer to question: Yes, notification must be made to Coast Guard.

Part C - Answer to question: Possible complication since requirement not exactly same as Coast Guard requirement. [Compare 46 C.F.R. Part 4.05-1); also applies to vessel within 12 miles of the shore (probably beyond California's competence)].

Section 8670.21 - Administrator To Negotiate Vessel Traffic Service System With Coast Guard

Part A - Answer to question: No preemption.

First tier: Relevant Federal statute: Ports and Waterways Safety Act (vessel traffic system) [category (b)].

Second tier: Not applicable as no conflict.

Part B - Answer to question: Yes, Administrator must obtain agreement with Coast Guard.

Part C - Answer to question: No other legal complications, nevertheless, it may be difficult to accommodate California and Coast Guard schedules and funding schemes.

Section 8670.22 - Prohibition Of Vessel Violating OPA90 (Amendment to 46 U.S.C. Chapter 37) Double Hull Requirement

Part A - Answer to question: No preemption.

First tier: Relevant federal statute: Subtitle II of title 46 U.S. Code (vessel construction) [category (b)].

Second tier: Not applicable as no conflict.

Part B - Answer to question: Yes, as merely enforcement of Federal statute.

Part C - Answer to question: May be complications as to enforcement.

Article 4 - Oil Spill Response and Article 5 - Contingency Planning and Articles 6 & 7 - Funds

Part A - Answer to question: Possible preemption.

First tier: Relevant Federal statutes: Section 311 FWPCA and OPA 90 [both category (c)].

Second tier: Possible conflict *re* Articles 4 & 5 if regulations in conflict with Federal regime.

Part B - Answer to question: Oil spill response subject to Coast Guard direction.

Part C - Answer to question: No other complications.

Section 8670.30 - Interim Vessel Contingency Plan, Including Proof of Financial Responsibility as Provided by Federal Law

Part A - Answer to question: Possible preemption.

First Tier: Relevant Federal statutes: Section 311, FWPCA and OPA90 [both category (c)].

Second Tier: Possible conflict if Administrator adopts conflicting requirements.

Part B - Answer to question: Yes certain requirements must be consistent with National Contingency Plan; financial responsibility provided under Federal law accepted.

Part C - Answer to question: Virtually certain to have additional complications stemming from acceptance of "Federal" (i.e. presumably under OPA90) financial responsibility proof

- complication # 1 - Federal financial responsibility applies *only* to OPA90 liability regime
- complication # 2 - OPRA requires that the State of California be named on the policy as an additional insured; that is inconsistent with Coast Guard requirements, and P & I cover for vessels does not now name

additional insured and would be most unlikely to do so for California.

Section 8670.37.51 - Financial Responsibility

Part A - Answer to question: No preemption.

First tier: Relevant Federal statute: OPA90 [category (c)].

Second tier: Not applicable as no conflict.

Part B - Answer to question: No attempt to accommodate Federal law.

Part C - Answer to question: Since no attempt to accommodate Federal law, no complications. [NOTE: Possible Law of the Sea innocent passage problem, as OPRA prohibits vessel transport of oil "across marine waters of the state" without state issued certificate of financial responsibility.]

Division 7.8 - Oil Spill Prevention and Response

Part A - Answer to question: Possible preemption.

First tier: Relevant federal statute - Section 311 FWPCA [category (c)].

Second tier: Possible conflict if regulations in conflict with Federal regime.

Part B - Answer to question: Yes, regulations required to be consistent with Coast Guard regulation; statute requires consultation with Coast Guard.

Part C - Answer to question: No other complications.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR

CAUSE NO. C95-1096

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,

v.

MIKE LOWRY, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHRAN, Prosecutor of Whatcom County; DAVID NEEDY, Prosecutor of Skagit County; JAMES KRIDER, Prosecutor of Snohomish County; and NORMAN MALENG, Prosecutor of King County,
Defendants,

v.

THE WASHINGTON ENVIRONMENTAL COUNCIL; THE NATURAL RESOURCES DEFENSE COUNCIL; AND OCEAN ADVOCATES, INC.,
Intervenors.

AFFIDAVIT OF C. JONATHAN NEEL
(States/British Columbia Oil Spill Task Force)

STATE OF WASHINGTON)
) ss
COUNTY OF THURSTON)

I, C. JONATHAN NEEL, being first duly sworn on oath, depose and state as follows:

1. I am employed by the State of Washington Department of Ecology. Presently, I hold the position of Spill Program Legislative and Intergovernmental Coordinator. Past positions have included Manager of the Ecology's Spill Management and Enforcement Section during the Nestucca oil spill, the Matsukaze oil spill, and MCN 5 barge oil spill. A copy of my resume is attached.

2. Washington State had experience a number of major *marine* incidents immediately prior to the Exxon Valdez including the:

SS Mobil Oil tanker spill (incident date - 3/20/84; location - Columbia River; material spilled - 200,000 gallons heavy oil; primary cause - improper installation of steering pin during maintenance).

Arco Anchorage tanker spill (12/21/85; Port Angeles; 239,000 gallons of crude oil; grounding as a result of pilot error).

MCN 5 barge oil spill (1/31/88; near Anacortes; 70,000 gallons heavy oil; improper overloading of barge).

Matsukaze double hull tanker grounding (4/28/88; rocks at Crescent Bay; no spill; officers on bridge asleep).

Nestucca barge oil spill (12/23/88; off Grays Harbor; 231,000 gallons of bunker oil; towing hawser in extremely poor condition).

3. All of these spills were caused by human error and clearly avoidable with relatively simple improvements in the marine industry's operations. The lack of adequate standards

and regulatory oversight of the marine industry was readily apparent to Ecology.

4. Based upon this past risk exposure, the exceptionally high economic value of Washington's natural resources, and the need to better coordinate West Coast spill response activities (particularly in the aftermath of the Nestucca barge oil spill) Ecology and the British Columbia Ministry of Environment decided that a formal mechanism should be established to coordinate spill related activities. In early 1989, British Columbia Premier Vander Zalm and Washington Governor Booth Gardner formed the British Columbia/Washington Oil Spill Task Force.

5. The day after the first Task Force meeting, the Exxon Valdez spill occurred on March 24, 1989, in Alaska. The states of Alaska, Oregon and California joined the Task Force soon after the Exxon spill when the four West Coast Governors and the British Columbia Premier signed a memorandum of cooperation. The name of the organization was then changed to the States/British Columbia Oil Spill Task Force (Task Force) and we began the West Coast's coordinated approach to oil spills. The members of the Task Force are the heads of the agencies responsible for oil spill prevention and response on the West Coast. One staff representative was assigned from each agency to coordinate input into the routine business of the Task Force. I am Ecology's representative.

6. The day to day activities of the Task Force are now coordinated by Jean Cameron, the organization's full time executive coordinator in Portland, Oregon. I am the Task Force's contract officer and manage the budget which is funded through member contributions through contracts with Ecology.

7. During my early involvement with the Task Force, the organization completed a number of independent studies. These studies were managed by the organization's "Prevention Alternatives Subcommittee", to which I was Washington's representative. The findings of this subcommittee constituted the rationale for many of the Task Force's recommendations. The studies were coordinated by a Canadian consulting firm, David Dickens and Associates. The actual studies were carried out by Dickens and a number of subcontractors.

8. The Task Force decided early on to bring all of the information generated by its committees together in one major technical and policy document. This document was titled the "Final Report of the States/British Columbia Oil Spill Task Force" and published in October 1990. *See* Exhibit 38: Final Report of the States/British Columbia Oil Spill Task Force.

9. The final report's recommendations were a synthesis of all information on oil spill prevention and response readily available at that time. In addition to the extensive Task Force funded studies, the final report was based upon a broad array of studies and reports for example:

> The 11 recommendations presented in the report entitled "Improving Marine Traffic Safety on Puget Sound Waterways - A Technology Assessment" published December 15, 1982. The report placed emphasis on human error as a primary causative factor in vessel casualties. The recommendations addressed marine safety issues ranging from speed limits, mariner qualifications, enforcement, implementation of National Transportation Safety Board recommendations, near-miss reporting, and bridge communications.

The 29 recommendations presented in the "Report to the Legislature" of the Washington State Oil Spill Advisory Committee, December 1986. This report was mandated after the Arco Anchorage oil spill. These recommendations addressed a range of vessel spill prevention and response issues including bunkering and lightering, and anchorage areas.

The 59 recommendations presented in the report of the Alaska Oil Spill Commission entitled "Spill - The Wreck of the Exxon Valdez - Implications for Safe Marine Transportation," January 1990. These recommendations addressed a range of marine safety issues including the need to effectively regulate foreign flagged vessels, application of best achievable technology, and the need for vessel owner commitment to safety.

The 14 recommendations presented in the 126 page report entitled "Issue Paper - Spill Prevention - Means of Preventing Spills of Petroleum and Other Hazardous Substances in Puget Sound" published by Washington State's Puget Sound Water Quality Authority, March 1990. (I participated in some of the committee's deliberations.) The recommendations dealt with training of vessel personnel, vessel design, spiller liability, and Puget Sound's vessel traffic system (VTS) among other issues.

We hoped that the weight of all of the West Coast states and province adopting the most important ideas in all of the studies evaluated by the Task Force would provide additional impetus for their actual implementation. The recommendations in the Task Force report were intended to be forwarded to and implemented by a range of entities including: the private sector; federal law makers and agencies; and state and provincial law makers and agencies.

10. Lead authors of the final report included one representative from each of the West Coast states and province of British Columbia. These individuals were: Jon Neel, Washington (overall lead author); Amy Glad, California; John Bones, British Columbia; Bruce Sutherland, Oregon and Lynn Kent, Alaska. Paul Heimowitz, who at that time worked for Washington State's Puget Sound Water Quality Authority, was also a major contributor.

11. A summary of the final report was presented at and published in the proceedings of the 1991 International Coastal Zone Conference in Long Beach, California.

Relationship Between the Task Force Recommendations and Washington State Legislation.

12. The Washington State Legislature passed a number of oil spill related bills during the 3 sessions immediately following the Nestucca and Exxon Valdez oil spills. As head of Ecology's Enforcement and Spill Management Section at that time, I was involved in the development of these legislative initiatives.

These legislative actions and requests included:

- In January 31, 1989, then Ecology Director Christine Gregoire wrote Washington's congressional delegation requesting a number of changes to federal law. The requests addressed oil spill liability, navigation requirements, oil barge double hulling, on-board spill response equipment, changes to the federal penalty structure, and improvements to the Coast Guard Vessel Traffic System (VTS).
- 1989 Session - House Bill (HB) 1853 & 1854: This legislation established a streamlined compensation

system for damages to state natural resources resulting from oil spills. House Bill 2242: Established financial responsibility requirements.

- 1990 Session - House Bill 2494: This legislation established spill response requirements for certain vessels and facilities. The Chair of the House Environmental Affairs committee went on record that, while the current session would focus on spill response, the subsequent session would focus on spill prevention. She made it clear that the complexity of spill prevention would require more time to complete thoughtful legislation.
- 1991 Session - House Bill 1027: This legislation established a wide array of spill prevention requirements and provided for a complete recodification of all spill related statutes. Major features of the 1991 legislation included creation of a new revenue source, establishment of new state agencies (including the Office of Marine Safety), and extensive spill prevention requirements.

The 1991 legislation was drafted by the Legislature's House Environmental Affairs committee's chief counsel with extensive input from Ecology and the Governor's office. Sometime following publication of the public review Draft Task Force report in July 1990, discussions between legislative staff, Ecology and the Governor's office took place in earnest as to the scope of the following year's spill proposed legislation. Initial and later discussions (after adoption of the final report) consciously focused on the recommendations outlined in Task Force report as the starting point for considering the potential array of issues to be addressed in the legislation.

The legislative development team wanted to make sure that these critical ideas, which were carefully evaluated and adopted by the Task Force, were addressed wherever possible. Once the legislation was drafted, extensive consultations took place during that fall and winter with all key stakeholders to obtain their input on the appropriateness of the proposed legislative concepts. By the conclusion of the 1991 session and the passage of House Bill 1027, the following recommendations had been addressed to some degree by state legislation:

Joint Recommendations

Near Miss Reporting
Tow Cables
Vessel Safety Measures
Petroleum Facility Worker Training
Mariner Qualifications
Tug Crew Training

Strong Sanctions
Proof of Financial Responsibility
Natural Resource Valuation

Enforcement Staff

Prevention Plans
Response Plans
Local Participation
Clean Up Requirements
Vessel Inspections
Prevention Education
Transfer Operations Review
Wildlife Rescue Training and Equipment
Transfer Containment
Incident Command System (ICS)

The specific information for each of these recommendations is found in the Final Report of the Task Force on pages 3-8. *See* Exhibit 38: Final Report of the States/British Columbia Oil Spill Task Force.

Washington Recommendations

Pilot Qualifications	Barrel Tax
Subtidal Land Losses	Economic Incentives
Federal Consistency	Harbor Safety Committees
State Agencies	

The specific information for each of these recommendations is found in the Final Report of the Task Force on pages 80-83. *See* Exhibit 38: Final Report of the States/British Columbia Oil Spill Task Force.

/s/ C. Jonathan Neel
C. JONATHAN NEEL

Signed or attested before me, *Laurie L. Carley*, by *C. Jonathan Neel*.

DATED this *3rd* day of *June*, 1996.

/s/ Laurie L. Carley
NOTARY PUBLIC, in and for the
State of Washington.
My commission expires: 1/31/99

[SEAL]

EXHIBIT 38

Final Report of the
States/British Columbia
Oil Spill Task Force

Province of British Columbia
State of Washington
State of Oregon
State of Alaska
State of California

October 1990

I. Executive Summary

A. *OVERVIEW*

Following the 231,000 gallon (873 m^3) *Nestucca* oil spill off the coast of Washington in December, 1988, British Columbia Premier William Vander Zalm and Governor Booth Gardner of Washington established the British Columbia/Washington Task Force on Oil Spills. The day after the first Task Force meeting, the *Exxon Valdez* struck Bligh Reef in Prince William Sound, and the Task Force membership soon expanded to include Alaska, Oregon, and California. (Maps 1-6 illustrate petroleum transportation flows and facilities on the West Coast and in each individual jurisdiction).

The mandate of the Task Force was to a) investigate ways and means of preventing oil spills; b) to review oil spill response procedures; c) document and assess the mechanisms for

handling compensation claims; and d) to develop a coordinated contingency plan for preventing and responding to oil spills in the future. This goal was to culminate in the adoption of a comprehensive set of recommendations which, if implemented, would minimize (to the extent practicable) the probability of major and catastrophic spills and help assure an effective response to such incidents. The Task Force used periodic meetings, subcommittee investigations, training forums, and other tools to accomplish this mandate.

B. *MAJOR FINDINGS*

Four Task Force subcommittees produced a detailed set of findings, many of which underlie joint and individual recommendations. These findings can be summarized by the following points:

1. Recent spills from the *Nestucca, Arco Anchorage, Exxon Valdez,* and *American Trader* have revealed significant problems in oil transportation management, including:

   a. Inadequate personnel training and qualifications
   b. Shortcomings in vessel design and integrity
   c. Insufficient traffic management
   d. Gaps in regulatory oversight
   e. Incomplete cost recovery by states/provinces

2. Despite research in spill cleanup technology, it is unlikely that a large fraction of oil can be recovered from a catastrophic spill.

3. Since response efforts can not effectively reduce the impact of large oil spills, prevention of spills must be the prime strategy in developing solutions to this issue.

4. Readiness and response to smaller size spills of oil or

refined petroleum products must still be emphasized, since much of the West Coast traffic is by barge and freighters carrying fuel.

5. Comprehensive oil spill prevention demands participation by industry, citizens, environmental organizations, and all governmental jurisdictions.

6. The States/B.C. Task Force on Oil Spills should continue to promote coordination of West Coast oil spill prevention and response efforts.

C. *JOINT RECOMMENDATIONS*

The following recommendations have the full support of all Task Force members. Individual recommendations by each Task Force member are presented in the body of the report, beginning on page 51. Recommendations have been subdivided by the technical nature of the issues to assist the reviewer in analyzing recommendations with similar characteristics.

The recommendations are not in priority order; priorities are detailed in section IV. The recommendations vary as to the governmental body that has authority to make the suggested changes, and will be forwarded to the appropriate "authorizing agent" through mechanisms identified in an implementation strategy (page 92).

The main objective of this Task Force, as reflected in the following recommendations, is to continue to work towards coordinated prevention and response to oil spills for the Pacific coast. Two aspects of this effort are particularly important: mutual assistance among the members for catastrophic spills, and interjurisdictional protocols for transboundary spills. To achieve these objectives, the Task Force will continue to work together to implement similar

response procedures to ensure consistency among the separate jurisdictions. To minimize the need for any response, recommendations to prevent spills occurring along the coast have been developed and given high priority.

Vessel Traffic Reduction

RECOMMENDATION 1: Petroleum Conservation

Implement programs designed to reduce petroleum consumption, such as conservation measures (including appliance and automobile efficiency standards, recycling, and effective mass transit), alternative energy source research, and economic incentives.

RECOMMENDATION 2: Alternative Oil Transportation

Review proposals for alternative transportation modes which would reduce petroleum transportation by tanker in high risk and environmentally sensitive areas. In reviewing any proposals, Task Force members are committed to insuring compliance with all applicable state/provincial/federal laws, including their processes to involve the public.

Vessel Traffic Management

RECOMMENDATION 3: Tug Escorts - Single Propulsion

Require tug escorts for all single boiler or single engine, and single screw tank vessels carrying oil or other petroleum products in waterways designated as high risk by an individual state or province.

RECOMMENDATION 4: Tug Escorts - Tonnage Requirements

Review and, if appropriate, reduce dead weight tonnage specifications for tug escorts requirements.

RECOMMENDATION 5: Vessel Traffic Service Systems

Upgrade vessel traffic service systems by replacing outdated equipment, eliminating gaps in coverage, increasing operator training and assignment length, and establishing mandatory participation in vessel traffic service systems in high-risk or congested areas.

RECOMMENDATION 6: Near Miss Reporting System

Establish, on a trial basis with a subsequent assessment of usefulness, a near miss reporting system which links directly with vessel inspection information, vessel traffic, and vessel casualty database systems.

RECOMMENDATION 7: Tow Cables

Develop and implement a mandatory set of guidelines for tugs on tow cable size and material specifications, cable maintenance practices, cable handling equipment design and barge recovery plan preparation.

RECOMMENDATION 8: Vessel Safety Measures

Establish regional safety measures, including speed limits, based on escort vehicle or other limitations, for all laden tank vessels in inland waters and their critical approaches.

RECOMMENDATION 9: Tow Systems

Require towing systems and plans on all tankers carrying oil and other petroleum products.

Vessel Design

RECOMMENDATION 10: Double Hulls

Require double hulls for all new tank vessels designed to carry oil or other petroleum products as cargo.

RECOMMENDATION 11: Onboard Navigation Improvements

Require all tankers carrying oil or other petroleum products in coastal and inland waterways to possess and operate an onboard navigation system, such as an Electronic Chart Display Information System (ECDIS).

Personnel

RECOMMENDATION 12: Petroleum Facility Worker Training

Require state/province certification of training programs for managers, workers, and safety officers at terminals which handle oil or other petroleum products. Program certification requirements should include spill prevention and response training.

RECOMMENDATION 13: Mariner Qualifications

Require more stringent mariner qualifications, including spill prevention and response training, simulator training, vessel class and size restrictions on deck officer certification, and alcohol and drug testing.

RECOMMENDATION 14: Tug Crew Training

Mandate oil spill response training for all tug crews involved in tank vessel operations.

RECOMMENDATION 15: Crew Requirements

Require two licensed officers (including pilot where appropriate) to be present on the bridge of all tankers carrying oil or other petroleum products while in inland waterways. Require adequate crew levels, sufficient to meet normal and emergency operation needs, for tank vessels carrying oil or other petroleum products.

RECOMMENDATION 16: Dedicated Tug Crews

Assign dedicated trug crews to specific classes of tugs and tank barges carrying oil or other petroleum products to assure familiarity with tug and tank barge operating characteristics.

Enforcement, Penalties, and Liability

RECOMMENDATION 17: Strong Sanctions

Legislate strong levels of civil and criminal sanctions for noncompliance with oil spill regulations.

RECOMMENDATION 18: Proof of Financial Responsibility

Raise state/Canadian federal proof of financial responsibility requirements to ensure spillers can finance oil spill related cleanup and damage costs.

RECOMMENDATION 19: Natural Resource Valuation

Develop and require use of methods of natural resource valuation which fully incorporate non-market and market values in assessment of damages resulting from spills.

RECOMMENDATION 20: Cost Recovery

Develop responsible party contracts to aid in the recovery of all natural resource damage and cleanup costs.

RECOMMENDATION 21: Liability Limits

Remove any ambiguity in federal law and guarantee a state's right to fully exercise its own liability standard. Increase the maximum limit of liability for oil pollution damage under Canadian law.

RECOMMENDATION 22: Coast Guard Enforcement

Increase the Coast Guard's ability to conduct routine on-water

surveillance patrols by increasing funding to U.S. Marine Safety Offices and Canadian Coast Guard Regional Offices.

RECOMMENDATION 23: Enforcement Staff

Establish adequate environmental resource agency staffing level devoted to enforce compliance with spill planning requirements, and aggressively pursue legal action against violators.

Regulatory Oversight

RECOMMENDATION 24: Prevention Plans

Require all facilities (and tank vessels larger than 10,000 dwt) which handle oil or other petroleum products to develop and implement spill prevention plans, which would at a minimum include risk-reducing transfer methods and personnel training specifications.

RECOMMENDATION 25: Response Plans

Require all facilities (and tank vessels larger than 10,000 dwt) which handle oil or other petroleum products to develop and implement spill response plans, which would at a minimum include response time, equipment, and staff support specifications.

RECOMMENDATION 26: Local Participation

Each state/province shall recognize and utilize local citizen expertise and knowledge in spill prevention and response efforts. This may include a volunteer training and coordination plan to enhance preparedness.

RECOMMENDATION 27: Clean Up Requirements

Ensure that all state, provincial, and federal agencies act in full cooperation to require the spiller or other responsible

party to meet all applicable state, provincial, and federal performance requirements.

RECOMMENDATION 28: Vessel Inspections

Require periodic (but not less than every two years) structural and mechanical integrity inspections of vessel equipment and hull structures on all tank vessels carrying oil or other petroleum products. Develop a priority inspection system for more frequent inspections of particular tanker features essential to safety, and for certain tankers, equipment, and companies with a history of stress fracture incidents and other safety problems.

Law of The Sea Treaty Provisions

Article 1
Use of terms and scope

* * * *

2. (1) "States Parties" means States which have consented to be bound by this Convention and for which this Convention is in force.

(2) This Convention applies *mutatis mutandis* to the entities referred to in article 305, paragraph l(b), (c), (d), (e) and (f), which become Parties to this Convention in accordance with the conditions relevant to each, and to that extent "States Parties" refers to those entities.

Article25
Rights of protection of the coastal State

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.

3. The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

Article38
Right of transit passage

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

Article305
Signature

1. This Convention shall be open for signature by:

(a) all States;

(b) Namibia, represented by the United Nations Council for Namibia;

(c) all self-governing associated States which have chosen that status in an act of self-determination

supervised and approved by the United Nations in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters;

(d) all self-governing associated States which, in accordance with their respective instruments of association, have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters;

(e) all territories which enjoy full internal self-government, recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters;

(f) international organizations, in accordance with Annex IX.

2. This Convention shall remain open for signature until 9 December 1984 at the Ministry of Foreign Affairs of Jamaica and also, from 1 July 1983 until 9 December 1984, at United Nations Headquarters in New York.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR

CAUSE NO. C95-1096

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,

vs.

MIKE LOWRY, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MCEACHRAN, Prosecutor of Whatcom County; DAVID NEEDY, Prosecutor of Skagit County; JAMES KRIDER, Prosecutor of Snohomish County; and NORMAN MALENG, Prosecutor of King County,
Defendants,

and

THE WASHINGTON ENVIRONMENTAL COUNCIL; THE NATURAL RESOURCES DEFENSE COUNCIL; and OCEAN ADVOCATES, INC.,
Intervenors.

AFFIDAVIT OF WILLIAM B. COLLINS

I, William B. Collins, am competent to testify, and have personal knowledge of the following:

1. I am a Senior Assistant Attorney General for the State of Washington and represent the defendants Mike Lowry, Christine O. Gregoire, and Barbara Herman in this matter.

2. Attached to this Affidavit are true and accurate copies of Plaintiff Intertanko's Response To Defendant State Of Washington's First Set Of Interrogatories, Nos. 11, 12, 24, and 25.

I certify under penalty of perjury under the laws of the State of Washington that the above is true and correct to the best of my knowledge.

DATED this 3rd day of June, in Olympia, Washington

/s/ William B. Collins
WILLIAM B. COLLINS

Subscribed and sworn to before me this 3rd day of June, 1996.

/s/ Linda Ahmuty
NOTARY PUBLIC in and for the State of Washington.

My appointment expires: 10-10-97

* * * *

INTERROGATORY NO. 24:

Paragraph 36 of the complaint states that by "reason of the Supremacy Clause of the Constitution of the United States of America (Article VI, Clause 2) the BAP regulations are pre-empted by the federal statues and international conventions cited above." With regard to this pre-emption claim, do you claim that any BAP regulation actually conflicts with a federal statute, regulation, treaty or international convention such that compliance with both the BAP regulation and the federal statute, regulation, treaty or international convention is a physical impossibility?

ANSWER: INTERTANKO objects to interrogatory No. 24 because it requests information without reference to time period and is in other respects vague, ambiguous, and overbroad. Subject to and without waiving the foregoing objections, INTERTANKO states that paragraph 36 reflects INTERTANKO's contention that Washington State standards that are inconsistent with federal/international standards are incompatible with Article VI Clause 2 of the U.S. Constitution. This pre-emption contention does not rely on an allegation that it is a physical impossibility for tanker operators to conform to both the federal/international regimes and the Washington State regime.

* * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

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THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
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MIKE LOWRY, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MCEACHRAN, Prosecutor of Whatcom County; DAVID NEEDY, Prosecutor of Skagit County; JAMES KRIDER, Prosecutor of Snohomish County; and NORMAN MALENG, Prosecutor of King County,
Defendants,

and

THE WASHINGTON ENVIRONMENTAL COUNCIL; THE NATURAL RESOURCES DEFENSE COUNCIL; and OCEAN ADVOCATES, INC.,
Intervenors.

AFFIDAVIT OF STANLEY J. NORMAN

STATE OF WASHINGTON)
) ss.
County of Thurston)

I. *BACKGROUND*

A. *Position*

My name is Stanley J. Norman, Commander, United States Coast Guard (retired), and member, Nautical Institute. The Nautical Institute is an international association of vessel masters dedicated to marine safety and maritime professionalism. I am a citizen of the United States, over the age of 18, and competent to provide testimony in this matter.

I am the Program Director for Policy and Planning at the Washington State Office of Marine Safety (OMS). My duties include the management and supervision of the OMS tank vessel prevention plan program, the vessel contingency plan program and the education/technical outreach program. I am also responsible for the development and implementation of agency policies and regulations and agency administrative procedures. I also serve as a custodian of the official public records for OMS. The exhibits attached to this affidavit are true and accurate copies of the documents contained in the files and library of OMS. I previously served at the Office of Marine Safety in the capacity of Senior Technical Specialist for Policy and Planning, and Tank Vessel Prevention Plan Specialist. In addition, I served as supervisor of the Puget Sound field office for the Office of Marine Safety for six months prior to assuming my current position.

B. *Education and Training*

I am a 1971 graduate of the U.S. Coast Guard Academy with majors in management and basic engineering. I am also a graduate of the Combined and Joint Staff Officer Course of the Armed Forces Staff College in Norfolk, Virginia. During my 22-year Coast Guard career, I received additional training in total quality management, personnel management, human relations, resource management, program planning, aids to

navigation, waterways management, search and rescue, and law enforcement.

C. *Experience*

My Coast Guard career included more than eight years of sea duty. I have served on five vessels. I served as executive officer or chief mate on one, and commanding officer or master of two: an ice-breaking tug, and a sea-going buoy tender. I've sailed extensively throughout the Atlantic and in parts of the Pacific Ocean. I've transited the Panama Canal, operated north of the Arctic Circle, and have extensive Great Lakes sailing time and experience with vessel management. My service ashore with the Coast Guard included program management and direction of several multi-million dollar programs.

During my assignment to high-endurance Coast Guard cutters, I supervised all deck department functions including extensive towing, replenishment at sea, maneuvering, and mooring. I was also assigned the additional duties of communications officer and assistant navigator.

In 1973 I became the Executive Officer, or chief mate, of the Coast Guard cutter Redwood in New London, Connecticut. As Executive Officer of the Redwood I was responsible for all aspects of administration, personnel, and operations of the vessel. I had the opportunity to plan and execute cargo loading, cargo storage, and liquid loading.

After four consecutive years of sea duty, I was reassigned to the Great Lakes Operations Center of the Ninth Coast Guard District in Cleveland, Ohio. In November 1975, I personally directed the search for the survivors of the ore carrier Edmond Fitzgerald, which sank in a severe Lake Superior storm.

From 1976 through 1979, I served as Senior Operations Center Duty Officer and Ice Navigation Officer for the Great Lakes. My duties included extensive vessel and boat management, as well as direct liaison with the shipping fleets that operated in the Great Lakes.

In 1979 I was selected to be the First Commanding Officer of a new icebreaker tug, the U.S. Coast Guard cutter Biscayne Bay, that was to be stationed in St. Ignace, Michigan. As First Commanding Officer, I developed, organized, and implemented a complete crew training program; developed administrative procedures for the vessel; supervised development of emergency procedures and an organization manual, as well as station bills; and accepted the vessel on behalf of the United States Government following construction.

Following graduation from the staff college in January 1982, I was reassigned to U.S. Coast Guard headquarters in Washington, D.C. as a military readiness planner.

In 1985 I returned to sea duty as Commanding Officer or master of the U.S. Coast Guard cutter Cowslip, a 180-foot, 1000-ton seagoing buoy tender responsible for aids to navigation, search and rescue, and law enforcement throughout the Chesapeake Bay, Potomac River, eastern shore of Maryland and the Virginia Capes. In 1987 I was reassigned to the staff of Commander Naval Base, Norfolk, Virginia as Senior Coast Guard Officer, where I served as assistant naval base operations officer, helping to manage the world's largest naval facility.

In 1989 I was transferred to Seattle, Washington as the Pacific Northwest Director of Waterways Management and Aids to Navigation. As program manager and director, I supervised the operations and administration of four ships,

five aids to navigation teams, two long-range radio navigation stations, and the Vessel Traffic Service of Puget Sound.

The Puget Sound Vessel Traffic Service is the United States' largest, busiest, and only international Vessel Traffic Service. As supervisor and program manager for the Vessel Traffic Service, I served as the U.S. member of the Canada-U.S. Joint Coordinating Group for Vessel Traffic Service in the Juan de Fuca region. During my tenure as program director in Seattle, my staff and the units that I supervised completed extensive waterways analysis and management surveys of all waterways in Oregon, Washington, Montana, and Idaho under federal jurisdiction. In addition, I worked extensively with the Vessel Traffic Service in Seattle to develop regulated navigation areas for Puget Sound, and the Puget Sound-specific regulations incorporated in the National Vessel Traffic Service Regulations. All of these federal regulations now reside in 33 Code of Federal Regulations (CFR).

I retired from the U.S. Coast Guard on July 1, 1993 and began work for the Office of Marine Safety on August 23, 1993.

II. *RULE ADOPTION PROCESS*

A. *Phases 1, 2, 3*

The Washington State Oil Spill Prevention and Response Act of 1991 (Act) created the Office of Marine Safety and mandated that owners or operators of tank vessels prepare and submit to OMS oil spill prevention plans for those vessels that meet the requirements of the Act. RCW 43.21I.010 and RCW 88.46.040. The Act also mandated that OMS only approve tank vessel prevention plans that demonstrated best achievable protection (BAP) for Washington's marine environment. RCW 88.46.040(3). The Office of Marine Safety approached

this challenge in three deliberate phases. Phase 1 and Phase 2 were designed to gather information on the tank vessel fleet operating in Washington, and the practices used by the owners and operators of those vessels. The phases are more fully described in Exhibit 1.

Phase 1 began with the filing of interim prevention plans by tank vessel owners and operators beginning on January 1, 1993. Interim prevention plans consisted of one to two pages which briefly described the tank vessel or vessels covered by the plan. The interim prevention plans were used to provide a picture of tank vessel traffic in Washington. From the interim plans, OMS learned that every year approximately 300 tankers and 150 tank barges operate in Washington waters.

B. *Development Process For BAPs*

In March 1993, OMS adopted Phrase 2 rules in Washington Administrative Code chapter 317-20. The order of adoption is attached as Exhibit 2. These original tank vessel prevention plan rules required owners and operators of tank vessels to submit to OMS their informational prevention plans that described the operating and management policies and procedures used by their company, and which demonstrated minimum compliance with existing federal and international standards. These detailed informational prevention plans were due for submission to OMS by September 3, 1993 or prior to the arrival of the first covered vessel in Washington waters.

Between September and December 1993, more than 70 prevention plans were submitted to OMS covering more than 500 vessels. These plans were reviewed by OMS staff for completeness and minimum compliance.

Beginning in November 1993, and continuing through April 1994, OMS conducted an extensive review of those

prevention plans. OMS researched other developments in the industry in order to produce an extensive list of current practices within the industry that held promise as potential best achievable protection standards. Industry practices and procedures were organized into four categories: Operating procedures; personnel policies; management practices; and technology.

OMS research included a very comprehensive library search and a close review of the States/British Columbia Oil Spill Task Force Reports and continuous monitoring of International Maritime Organization (IMO) subcommittee work. In particular, the efforts of the subcommittees on Safety of Navigation, Standards for Training and Watchkeeping, and Flag State Implementation were followed. OMS staff attended U.S. workgroup sessions to develop U.S. positions for IMO delegations to those subcommittees.

C. *Advisory Group*

In April 1994, OMS chartered an Advisory Group on Best Achievable Protection Standards consisting of experts on marine transportation and environmental protection. The Charter is attached as Exhibit 3. The Advisory Group was composed of representatives from both the public and private sectors. Industry representation included tanker managers, tanker operators, and other experts and professionals. I chaired the Advisory Group. A list of Advisory Group members is attached as Exhibit 4. The Advisory Group met five times to review and refine the draft best achievable protection standards and the draft rules for tank vessel prevention plans that would eventually replace chapter 317-20 WAC with a new chapter, chapter 317-21 WAC. The minutes of their meetings are attached as Exhibits 5, 6, 7, 8, and 9. An example of the draft rules which illustrates the scope of

the changes made by the Advisory Group is included as Exhibit 10.

During the process of developing and implementing the BAP standards, by agreement between OMS and the Coast Guard, I was sent to Washington, D.C. on June 25, 1994 to brief the senior staff at U.S. Coast Guard Headquarters, including representatives from the Marine Safety Office, the Navigation Office, and the Chief Counsel's Office, of the U.S. Coast Guard on best achievable protection standards that had been developed by the Advisory Group at OMS. My report of the trip is attached as Exhibit 11.

D. *Public Workshops and Hearings*

OMS conducted public workshops in July 1994, to solicit public comments on the draft best achievable protection standards. The media release and the official notice are attached as Exhibits 12 and 13. A compilation of the comments is attached as Exhibit 14. These comments were provided to the Advisory Group for their use in reviewing the draft rules for the BAP standards. The proposed rules were published in the Washington State Register on September 21, 1994. Public hearings were held in Vancouver, Washington on October 18, 1994, and in SeaTac, Washington on October 20, 1994, to obtain oral testimony on the proposed BAP rules. In addition to the testimony received at the public hearings, OMS accepted written comments through November 7, 1994. A copy of the Hearing Examiner's Report on the proposed rules is attached as Exhibit 15.

E. *Adoption of Chapter 317-21 WAC*

Chapter 317-21 WAC was adopted on December 9, 1994, after an extensive review of all comments received. *See* Exhibit 16. The rules were scheduled to become effective on June 7, 1995.

In order to facilitate compliance with these new rules, OMS developed Model Tanker and Tank Barge Prevention Plans. Because the development of these extensive model guidance documents took longer than expected, the effective date of the rules was pushed back to July 7, 1995 for tankers, and July 31, 1995 for tank barges to allow owners and operators additional time to study the models and produce better, more comprehensive prevention plans. The model plans provide templates for tank vessel owners and operators to use as they develop their prevention plans and describe the documentation required to demonstrate compliance with the rules.

F. *Amendments To BAPs In 1996*

Approximately two months after adoption of the BAP standards, in February 1995, OMS was notified by two groups that they believed there were some problems with the standards. One group was the State Board of Pilotage Commissioners, who was concerned that there may be some conflicts or some problems with clarity in those portions of the BAP standards that affected pilots. The other group was maritime labor, which had not been directly involved in the Advisory Group, although they had received mailings and other information. Maritime labor was primarily concerned over the drug and alcohol testing requirements due to possible impacts on collective bargaining agreements.

Between March and October 1995, a number of meetings were held with maritime labor, the Puget Sound Pilots, and the Board of Pilotage Commissioners in an attempt to make technical changes to the rules that would resolve the issues raised. Amendments to chapter 317-21 WAC were proposed in October 1995. *See* Exhibit 17. The notice to the public and the Hearing Examiner Report on the amendments are attached as Exhibits 18 and 19. The amendments were adopted on

January 17, 1996 and became effective on February 17, 1996. *See* Exhibit 20. The changes to the BAP standards covered three primary elements: (1) coordination with pilots, (2) voyage planning, and (3) drug and alcohol testing.

The changes to the Coordination with Pilots requirement were designed to facilitate an exchange of information and to recognize that a pre-escort conference covering many of the same items is required under 33 C.F.R. Part 168, the tanker escort rules issued by the Coast Guard pursuant to OPA 90. The changes to the Voyage Planning section added the caveat that the plan should not be adhered to without deviation; the advice of the vessel's state licensed pilot and varying local conditions must be taken into consideration. The pilot will come aboard and supplement the information that the vessel crew has already gleaned from such documents as the Coast Pilot, Tide Tables and nautical charts.

The other technical change added a section to clarify that state-licensed pilots are not subject to the alcohol and illicit drug chemical testing policies in the BAP standards because they are already covered by the State Board of Pilotage Commissioner's drug and alcohol program. The amendments also make it clear that the primary purpose for the changes in the drug and alcohol testing program was to ensure compatibility with federal standards which were being revised during the six-month period between adoption and effectiveness of the BAP standards. Those changes included specifying that post-accident testing was required of only those crew members who may have been directly involved in the accident. They also require that the name, rating, and assigned vessel of any navigation or engineering watch stander who remains employed by the owner/operator as a watch stander after testing positive for drugs or alcohol two or more times during the previous 12 months of employment

be reported to OMS. This change was at the recommendation of labor organizations, which indicated a need for some flexibility in reporting names due to privacy considerations.

In addition, the definition of "illicit drug" was changed to conform exactly with the federal definition in the testing panel used by the U.S. Coast Guard. The percentage of random testing required was amended to equal the random testing requirement in 46 C.F.R. Thus, the changes made to the BAP standards in 1996 were designed to make the standards flexible enough to take into account changes in pilot procedures as a result of State Board of Pilotage Commissioners activities and changes in drug and alcohol testing procedures due to changes in the federal drug and alcohol testing program. The State Board of Pilotage Commissioners supported the amendments. *See* Exhibit 21.

III. *EXPLANATION OF BEST ACHIEVABLE PROTECTION (BAP) STANDARDS*

Washington's Best Achievable Protection Standards are divided into four major categories: Operating Procedures, Personnel Policies, Management Practices, and Technology. Those major categories are then subdivided into subcategories and elements. The proposed list of categories and elements is included as Exhibit 22.

A. *Operating Procedures*

1. The first subcategory under Operating Procedures is **Watch Practices.** WAC 317-21-200.

a. The first element is the *Navigation Watch. See* WAC 317-21-200(1). Washington requires at least two licensed deck officers, a helmsman and a lookout. During periods of restricted visibility only, three licensed navigation officers are required. The reason for adding a licensed officer

during restricted visibility is in order to perform the three primary bridge management functions that are outlined in Bridge Resource Management. Those three functions are navigation, collision avoidance, and administration. During periods of restricted visibility the workload should be evenly distributed between those three functions.

When visibility is not restricted, an individual officer is able to combine the workload from one, two, or even three functions, depending on the area in which he or she is navigating. During restricted visibility, when a great deal more attention needs to be paid to both navigation and collision avoidance, the Advisory Group and OMS determined that an additional officer was required so that the workload could be balanced.

The primary function of a deck officer is to reduce the risk of groundings and collisions which are the two primary causes of catastrophic oil spills. Specifically, groundings are usually caused by navigational errors. Collisions are usually caused by collision avoidance errors. By assigning a deck officer to each of those functions, sufficient emphasis should be placed on each to greatly reduce the risk of a mistake.

This provision primarily affects vessels during restricted visibility in the 70 miles west of Port Angeles, in the Strait of Juan de Fuca. The Strait of Juan de Fuca is unique in that the 70 miles west of Port Angeles is entirely within Washington and U.S. waters on the inbound lane, and Canadian waters on the outbound lane. State pilots do not board vessels until they have transited for approximately five hours through state waters to Port Angeles. State pilots who board at Port Angeles count as the third officer.

b. The next element of Operating Procedures, Watch Practices, is *Bridge Resource Management. See* WAC

317-21-200(2). Bridge resource management is an internationally recognized and proven system for improving the efficiency and performance of vessel bridge teams. *See* Exhibit 23: "Bridge Resource Management" by Richard T. Johnson, National Transportation Safety Board, MITAGS *Bridge Team Management Course*, Marine Institute of Technology and Graduate Studies, October 1993, pp. 1-18 (hereinafter "MITAGS"). Washington's standards call for bridge resource management for all tankers. Included within the bridge resource management system must be provisions for accomplishment of its three functions: navigation, collision, avoidance, and administration. Washington standards for bridge resource management also include requirements for comprehensive voyage planning and coordination with pilots. These requirements are linked, just like the navigational watch composition is, to an effective bridge resource management system. The purpose of bridge resource management is to avoid collisions and groundings, the two primary causes of catastrophic oil spills.

c. The next element of Operating Procedures, Watch Practices, is *Coordination With Pilots*. *See* WAC 317-21-200(3). This element is linked directly to bridge resource management. Washington requires the use of a checklist to facilitate the communication between vessel bridge teams and pilots. When a pilot comes aboard a merchant vessel, particularly a merchant vessel with a crew that is not familiar with local waters, the pilot becomes a key member of the bridge team, providing local expertise and considerable knowledge to assist the vessel's crew in navigating the vessel safely into port. It is essential that the pilot and the vessel's navigation team work closely together. The purpose of the checklist required by Washington State is to ensure that the communication is as complete as possible between the vessel crew and the pilot and to provide redundancy in the sense that

the vessel crew needs to know the actions the pilot plans to take, and the pilot needs to know what actions the crew plans to take, so that both can support each other. *See* Exhibit 24, MITAGS Checklist and Exhibit 25, the Washington State Pilotage Rules and Checklist, WAC 296-116-205 and 2051. If an individual makes a mistake there will be additional individuals to catch that mistake and help correct it before it turns into a bigger mistake. The National Transportation Safety Board recognized the critical need for good communication between the pilot, the master and other crew members on the bridge in Safety Recommendation M-93-34, issued on June 25, 1993, following the NTSB's investigation of the grounding of the Queen Elizabeth 2 ("QE2") in Vineyard Sound, Massachusetts. A copy of that recommendation is attached as Exhibit 26.

d. The next section under Operating Procedures, Watch Practices, is *Security Rounds*. *See* WAC 317-21-200(4). OMS and Advisory Group review of Phase 2 prevention plans indicated that nearly all tanker crews made security rounds while in port. The primary purpose of the security rounds is to detect fires, flooding, and other anomalies early, so that they can be dealt with before they become major problems. The Washington standard requires a security round underway and at anchor as well as in port, every two hours, or once per watch, if a vessel has installed monitoring systems, which is fairly common. The Washington standard allows the security rounds to be conducted by any properly trained crew member. The primary focus of most security rounds it detection of small fires that can grow to be major fires. The intent related to prevention of oil spills is to reduce the likelihood that the vessel will become disabled and drift aground due to a fire. In addition, there is the possibility that a vessel can catch fire and burn to the extent that enough structural damage will be done to allow oil to escape into the

water. The primary purpose, however, is to prevent a fire or other casualty from disabling a vessel and allowing it to drift aground or lose steering and collide with another vessel.

There was a great deal of discussion at the Advisory Group about what sections of the ship should be inspected. There was some concern that having the crew member inspect in and around the cargo area would possibly subject the crew member to some danger being out on deck at night. For that reason, the Washington standard calls for the master to designate the spaces that will be inspected, relying on the master's professional judgment to determine which sections of the vessel could be safely inspected.

The Washington standard also defines the appropriate interval. Since most of the Phase 2 prevention plans indicated that the security round interval most frequently used in the industry was every four hours, OMS adopted that standard. For those few vessels without monitoring systems for flooding and fire, OMS believed that security rounds were needed more often.

e. The next section under Operating Procedures, Watch Practices, is *Anchor Watch*. *See* WAC 317-21-200(5). The Washington standard calls for a continuous anchor watch by a navigation officer on the bridge, and plotting of the vessel's position at anchor once per hour.

There is a history in Washington of problems with vessels dragging anchor. Several incidents occurred in the three years preceding the development of these standards of tank vessels dragging anchor in Port Angeles, and other types of vessels, which could include tank barges, dragging anchor in South Elliot Bay during heavy weather, and sometimes in not-so-heavy weather. In one instance in Port Angeles, when the VTS detected that the vessel was dragging anchor, they were

unable to communicate this to the vessel's crew because there was no anchor watch monitoring the ship's radio. As a result, a pilot had to be dispatched from the pilot station to board the vessel and reset the anchor. The major hazard that an anchor watch prevents is the vessel dragging anchor and subsequently colliding with another vessel or running aground. The objective of this standard is to prevent a small incident from becoming a large oil spill. The provision to plot position hourly was derived from the practices as reported by the industry in their Phase 2 informational prevention plans. As a practical matter, navigation officers monitor the position of a vessel at anchor by radar ranges and bearings on fixed objects ashore, which is relatively easy to do in a continuous manner by setting the radar up to alert the officer whenever the range parameters from a particular point ashore change more than would be expected by a vessel swinging on its anchor chain.

f. The final standard under Operating Procedures, Watch Practices, is composition of the *Engineering Watch*. *See* WAC 317-21-200(6). Many tank vessels now have a certificate for unmanned engine room operation. OPA 90 contained a provision that required the Coast Guard to do rulemaking regarding engine room manning. The Coast Guard rulemaking requires in U.S. waters that all tank vessels have a manned engine room, or manned machinery spaces. Some modern vessels are built with machinery spaces and engineering control rooms. In some cases, the engineering control room is a considerable distance away from the machinery spaces. My experience on a new Coast Guard cutter was similar. My vessel had an engine room, and motor room, and auxiliary machinery space located below decks, and a control room for all those spaces located on the main deck. The issue then is if propulsion or steering is lost, and machinery needs to be reset or adjusted to regain propulsion

or steering, can all that be done from the control room, or must some of it be done from the machinery spaces themselves?

The experience of everyone in the Advisory Group, myself included, was that there are some things that can be reset from the control room, and some things that a crew person has to be dispatched to the machinery space to reset or adjust. As a result, there can be a substantial time lag between loss of propulsion or steering, or electrical power for that matter, and the ability to regain it, because the crew member, if only assigned to the control room, must be dispatched to the machinery spaces, evaluate the situation, and make adjustments.

The Washington standard, therefore, calls for a licensed engineer in both the engineering control room and the machinery spaces, if they are located apart from each other, while the ship is engaged in critical maneuvering. Generally, those would be times of either mooring, unmooring, anchoring, leaving anchorage, or reducing speed or stopping to receive a pilot. The intent is to provide someone in each of the two spaces capable of restoring propulsion and steering as quickly as possible during these critical situations. The reason for this standard is to ensure prompt restoration of steering propulsion and electrical power in the event of a casualty. The risk if this standard is not implemented, is that the vessel will run aground or collide with another vessel as a result of a machinery casualty.

2. The next subcategory under Operating Procedures is **Navigation**. *See* WAC 317-21-205.

a. The first element under Navigation is *Fix Intervals*. *See* WAC 317-21-205(1). As a practical matter, to determine set and drift, at least two fixes are required. Then

to fix the actual progress of the vessel through the water, the fixes are measured against planned progress. The speed that the vessel should move, uninfluenced by currents and wind, is measured against the direction the vessel should move uninfluenced by currents and wind.

This particular element was the subject of much discussion by the Advisory Group. The Phase 2 prevention plans indicated fix intervals everywhere from "undefined" down to "six minutes" in some areas of Washington waters, depending on the narrow channels and traffic levels. Technology is available that allows vessel navigators to fix their position electronically almost instantly, and with very little effort. After considerable discussion, the Washington standard became constant monitoring, in the same way that there is the ability to constantly monitor at anchor to prevent groundings and collisions. There is also the ability for a vessel to monitor its position constantly while moving and to record the position, manually or electronically, at least every 15 minutes. A tanker proceeding at its normal cruise speed generally travels between 13 and 16 knots. Fifteen minutes means that the vessel will move approximately four miles in that period of time. The Advisory Group and OMS believed that a position should be plotted every 15 minutes to give an indicator to the vessel navigation team as to where they are, relative to where they plan to be. Since four miles is a considerable distance, the Advisory Group believed that 15 minutes should be a minimum interval for plotting fixes, and that fixes in some cases should be done more often. As a consequence, the constant monitoring provision was entered in the standard.

b. The next element under Operating Procedures, Navigation, is *Voyage Planning*. *See* WAC 317-21-205(2). In a manner similar to the Washington Pilot Coordination

Requirements, the Advisory Group and OMS maritime experts determined that it would be helpful to provide a checklist of items to be considered and publications to be consulted in the course of voyage planning. The checklist, like the pilot coordination checklist, is designed to facilitate the crew's accomplishment of voyage planning. It helps the crew review all of the appropriate publications and consider all the elements of a comprehensive voyage plan to provide a navigation guide through state waters for that particular voyage.

c. The next element under Operating Procedures, Navigation, is *Compass Checks*. *See* WAC 317-21-205(3). The Washington standard requires tanker masters to establish a schedule for comparison of gyro-compass and magnetic compass. A gyrocompass is an instrument that uses the rotation of the earth and inertia to indicate true direction. A magnetic compass indicates direction based on the location of the earth's magnetic poles. A comparison of the two compasses is generally the method used to determine gyro-compass and magnetic compass errors and then those errors are applied to the two compasses to ensure an accurate reading on both and to avoid faulty steering. The compass comparison method was the method referred to most frequently in the Phase 2 prevention plans as the method used to determine compass error on vessels.

d. The next element of Operating Procedures, Navigation, is *Port Angeles* tug assist. *See* WAC 317-21-205(4). This element was not challenged in this lawsuit. This element codifies an existing voluntary procedure developed to provide assist tugs to vessels anchoring and departing anchorage in Port Angeles. The reason for this element is that the anchorage area is heavily used and subject to high winds. This element is also based on the incident described earlier for

anchor watch. There was a need to add some additional capability to vessels trying to operate at slow speeds, maneuver among other vessels, and also remain anchored when the wind speed picked up.

3. The next subcategory under Operating Procedures is **Engineering**. *See* WAC 317-21-210.

a. The first element under engineering addresses *standby electrical generators*. *See* WAC 317-21-210(1). Electrical power on a vessel is extremely critical. Most of the navigation equipment and other electronic devices operate from the electrical power generated in the machinery spaces by what is called a ship service generator. Most vessels are equipped with more than one. Most modern vessels have an automatic switching gear, which is essentially a circuit breaker. When the generator being used fails, the switching gear automatically activates another generator and maintains electrical power. With this system, very little time is lost in regaining electrical power in the event of a failure of the primary generator. However, some vessels do not have this automatic standby switching gear. The Washington standard is designed to ensure that in the event a vessel does not have automatic standby switching gear, the standby generator is running and immediately available to assume the electrical load and thereby restore electrical power as quickly as possible. Frequently, the loss of electrical power also results in the loss of propulsion. Thus, restoration of electrical power quickly is critical to maintaining control of the vessel.

b. The second element under Operating Procedures, Engineering, is *steering gear inspections*. *See* WAC 317-21-210(2). The state requirement is for hourly inspections of the steering gear while in state waters. The steering "flat" is the room on a ship where the steering gear is located. The purpose of this requirement is to ensure that the steering gear

continues to work as it did when it was inspected and tested 12 hours before entering Washington waters. The Advisory Group believed and the OMS research indicated that steering gear could fail between 12 hours outside state waters and arrival at a safe mooring. These inspections of the steering gear are designed to highlight or identify small problems before they become major problems and control of the direction of the vessel is lost.

There is a provision in the standard for a monitoring system. If a company chooses to install an adequate monitoring system, the requirement is waived for hourly inspections by personnel. Generally, the hourly inspections of the steering gear that were indicated in the Phase 2 prevention plan as a practice by the industry were conducted as part of a routine survey of all machinery and auxiliary machinery spaces by engineering personnel.

c. The third element under Operating Procedures, Engineering, is *scoop injection systems*. *See* WAC 317-21-210(3). This element was added in the unlikely event that tankers coming into Washington waters would use scoop injection systems. The reason it's unlikely that tankers will have scoop injection systems is that this is a passive system of machinery cooling that only works on high speed vessels, and very few tankers operate at speeds high enough to make this efficient. A scoop injection system is more efficient and effective than pumping cooling seawater for use in the main propulsion system. The way it works is a scoop, essentially like an air scoop in a vehicle, located below the water line of a vessel traveling at 20 knots or more, will allow for the intake of cold saltwater. Due to the speed of the vessel, the cooling water is forced into the engineering system and back out without the sustained assistance of pumps.

The state requirement is that these systems be secured or turned off before entering state waters and that instead the vessel use its installed pumps to provide cooling water to its propulsion system and to its electrical generating systems. The reason for this provision is that if a ship does have a scoop injection system, it does not function properly at the lower speeds normally used in coastal waters. Most systems will fail if adequate cooling water is not supplied. The requirement is designed to prevent failure in the propulsion and electrical generating systems, thus reducing the risk of accidents.

d. The final Operating Procedure, Engineering, element is *main engine fuel changeover*. *See* WAC 317-21-210(4). It has become a common practice on some vessels to use a heavier, less refined fuel when out at sea, and a more expensive, lighter refined product when maneuvering. In California, for many vessels the lighter refined product is required to meet air emission requirements. That is, in California waters, vessels will switch to a more refined, lighter product or oil in order to reduce the sulfur emissions that generally result from burning heavier fuel oil. OMS discovered, and Advisory Group members confirmed, that frequently during the process of changing from heavy fuel oil to light fuel oil, propulsion is lost due to malfunctions within the propulsion system. In order to prevent the loss of propulsion within state waters where vessels have less room to maneuver, the requirement in the BAP standards is that if a vessel uses this system, the switchover must take place outside of state waters.

While the Advisory Group was meeting, a cargo vessel in the Mississippi River near New Orleans switched from heavy to light fuel, lost propulsion, and experienced a casualty. This incident confirmed our concern that this fuel changeover was an engineering procedure that should best be conducted in an

area where loss of propulsion would not have a detrimental effect on the vessel or result in a grounding or collision.

4. The next subcategory under Operating Procedures is **Prearrival Tests And Inspections.** *See* WAC 317-21-215. The Washington standard defines critical navigation and engineering equipment subsystems that should be tested. A subsystem failure may result in a failure of the main propulsion system, the electrical generating system, or the steering system. The subsystems included are main lubrication oil pumps, main fuel oil pumps, oil system strainers, settler and service tanks, cooling water systems, including pumps, intake air blowers, and air control systems. For steam vessels, spare boiler burners, forced draft fans, and feed water pumps are added. Thus, the state requirement further defines main propulsion system checks and inspections and adds navigation equipment. Prearrival tests and inspections elements and items were drawn primarily from expert engineers provided by ARCO Marine and American President Lines. Like nearly all of the operating procedures, these standards are designed to prevent collisions and groundings, and subsequent oil spills.

5. The final subcategory under Operating Procedures is **Emergency Procedures**. *See* WAC 317-21-220. Station bills are required for fire, abandon ship, man overboard, and oil spill response. A station bill is a listing of all personnel on the vessel, where they would go in each of these emergencies, what they should bring with them, and what their action is to be in response to the emergency. Station bills are generally very comprehensive. Based on written procedures submitted as part of the Phase 2 prevention plans by virtually all major companies, the state standard also includes a requirement for written procedures on how to respond to collisions, groundings, hull breach or structural failure, loss of propulsion, loss of steering, loss of electrical power, or

compass malfunction. In addition, the state standard adds written preparation procedures for three other potential situations: (1) emergency towing, (2) loss of throttle control on the bridge, and (3) heavy weather. These procedures were outlined in the Phase 2 prevention plans as situations in which a written procedure needed to be promulgated and developed in order to tell the crew how to handle the potential situation. Written procedures help vessel crews avoid groundings and collisions. They also help the crew mitigate the damage if a grounding or collision does occur.

6. An additional subcategory within Operating Procedures is entitled **Events**. *See* WAC 317-21-225. This subcategory requires vessels that experience an event to maintain the documentation that would be required to investigate that event. The documentation surrounding an event must be safeguarded so that investigators will be able to reconstruct the event, and promulgate "lessons learned" through prevention and safety advisory bulletins.

B. ***Personnel Policies***

The next major category of BAP standards is Personnel Policies.

1. The first subcategory within Personnel Policies is **Training.** *See* WAC 317-21-230. Sixty-five (65%) to eighty percent (80%) or more of all vessel accidents and casualties are caused by human error. *See* Exhibit 27. Therefore, the personnel policies standards promulgated by the state of Washington are critical to preventing oil spills. A study done by the National Ports and Waterways Institute at the beginning of the Advisory Group process identified training as the single most critical subcategory that should be addressed.

The training program required by Washington includes three primary elements. They are (1) orientation training for

all new crew members, (2) position-specific training for all crew members, and (3) refresher training for crew members to validate the position-specific training received previously. In addition, shipboard drills or practices are also included under training, since they are a vital part of a comprehensive training program. Drills allow the crew to actually practice the procedures they have been trained for. An example of a Phase 2 Training Plan from SeaRiver Maritime, Inc., is attached as Exhibit 28. The Phase 2 Training Outline of Stolt-Nielson, Inc. is attached as Exhibit 29.

a. The state standard for *vessel orientation training* includes all new crew members or all members returning to vessels of a type they have not served on within the past year. *See* WAC 317-21-230(2). It also includes maintenance personnel who sail on ships, because the orientation requirements are principally safety-oriented. The orientation training includes familiarization with the individual crew member's station assignments and responsibilities, including both emergency responsibilities and routine responsibilities. It also includes a walking tour of the spaces on the vessel that are designated by the master. The purpose of the walking tour is to familiarize the new crew member with the vessel's layout, as well as to identify escape routes for the new crew member from the place where he or she sleeps, and from the place where he or she works.

b. *Position-specific training requirements* are laid out in the state standard by each primary position on a vessel. Companies have been given three years to comply with this requirement. This means that an individual employed on a vessel on June 7, 1995, needs to complete the training specific to their position by June 6, 1998. Crew members subsequently employed have three years from the date of their employment to complete this training.

The state standard consolidates international and federal standards and adds shipboard management training, bridge resource management training, and automated radar plotting aids (or "ARPA") training for selected officers. The shipboard management training requirement applies only to senior officers: the two senior engineers and the master and chief mate. The purpose of this training is to improve communication and human resource management. This training will be required at the international level in order to be in compliance with the International Safety Management (ISM) Code that takes effect in 1998. State, federal, and international authorities are encouraging ship owners and operators to immediately start working toward certification under that code.

Bridge resource management training supports the requirement for the bridge resource management operating procedure. The procedure is to improve bridge communication and thus reduce the risk of collisions and groundings.

ARPA training (Automated Radar Plotting Aid Training) is required in the 1995 Standards for Training, Certification and Watchkeeping for Seafarers (STCW) Amendments for all vessels equipped with ARPA. Under international standards, all tankers except the very smallest tankers are required to have ARPA. During the review of the Phase 3 prevention plans that have been received to date, it has become apparent that there is only one tanker that routinely operates in Washington that is small enough to fall below the international requirement for ARPA. We are working with that company to determine a method by which they can have an alternative compliance system.

The state standard requires a training program that clearly illustrates the method of training, the qualifications of

instructors, the length and location of the instruction, and the method used to evaluate student performance at the end of the course. This is completely consistent with the training quality control provisions of the 1995 STCW Convention Amendments.

c. The third primary element of a comprehensive training program is *refresher training*. The state standard for refresher training is derived directly from the STCW and the federal requirement for license renewal or mariner document renewal every five years. Thus, the refresher training is timed to coincide or just precede the application by the mariner for a document renewal and ensures that the officers and crew stay current in their position-specific skills.

d. The final element under training is *shipboard drills*. This element is linked directly to the requirement for emergency procedures under the operating procedures category of the BAP standards, because drills are necessary to build competence in applying procedures during an emergency. The Washington State standard applies the U.S. federal standard to foreign vessels, increasing the frequency of fire drills from monthly to weekly. The reasoning behind this is that foreign tank vessels pose the same amount of risk to Washington waters at U.S. tank vessels. To coincide with the element on required emergency procedures, loss of propulsion drills, loss of electrical power drills, emergency towing, and man overboard are required quarterly drills.

2. The second subcategory within Personnel Policies is **Illicit Drugs and Alcohol**. *See* WAC 317-21-230. The state standard requires all companies to establish a testing program consistent with the U.S. testing program in 33 C.F.R. Part 95 and 46 C.F.R. Parts 4 and 16. The federal standard for drug and alcohol testing requires random drug tests, pre-employment drug tests, and probable cause/post-incident drug

and alcohol tests for U.S. Mariners in safety sensitive positions. The Washington standard includes random alcohol tests and applies the federal standard plus the Washington standard to all crew members on all covered vessels. Essentially, Washington has a "zero tolerance policy" for the use of illicit drugs or alcohol while a tanker is operating in Washington waters.

The purpose of an illicit drug and alcohol testing program is to prevent the use of drugs and alcohol, thereby preventing crew members from being intoxicated from the use of those substances and being unable to properly perform their duties. The state drug and alcohol testing regime is based primarily on SeaRiver Maritime's program as presented by the SeaRiver representative on the Advisory Group.

3. The next subcategory within Personnel Policies is **Personnel Evaluations**. *See* WAC 317-21-240. This subcategory includes two elements: fitness for duty and performance review.

a. Washington requires vessel officers to monitor each crew member's fitness for duty and to replace watch standers who are unfit to stand watch due to illness or other factors in order to maintain competent performance of all duties.

b. The next element is performance reviews for permanent crew members. Washington requires performance feedback for all personnel in order to promote improvement of performance in the future. The performance review element also requires a list of additional training needs identified during performance review. Thus, another linkage in the standards is between performance review and training requirements.

4. The next subcategory within Personnel Policies is **Work Hours**. *See* WAC 317-21-245. The federal standard for work hour limitations on tankers as contained in 46 U.S.C. pursuant to OPA 90, is crew members may work no more than 15 hours in 24 hours, or 36 hours in 72 hours, including administrative duties, except in an emergency. In addition, a licensed deck officer may not assume navigational watch duties when departing a U.S. port unless he or she has been off duty at least six hours of the 12 hours prior to departure. The purpose of this requirement is to help ensure peak performance and eliminate the risk of accidents due to fatigue.

The Washington standard applies the U.S. standard to all tank vessels. The logic behind doing this is that foreign flag vessels pose the same level of risk to Washington waters as U.S. flag vessels.

5. The next subcategory within Personnel Policies is **Language**. *See* WAC 317-21-250. The Washington standard requires persons in charge of navigation watches and oil transfers to communicate effectively in English in order to safely accomplish their assigned duties. As a practical matter, all deck officers are already required to speak some English. Engineering officers who are in charge of bunkering (vessel refueling) should also be able to communicate effectively in English. In addition, the Washington standard highlights the need for multi-national crews to be able to communicate with each other in a common language.

The rationale for this rule is to improve the English language communication by critical vessel personnel, particularly those who are navigating the vessel through the 70 miles from the entrance to the Strait of Juan de Fuca to Port Angeles, before an English speaking state-licensed pilot boards the vessel. English language proficiency for

engineering officers involved in bunkering is also critical to avoid operational oil spills during refueling.

All multi-national tanker crews are required to use a common language and the manuals and other written instructions are to be printed in the common language used aboard the vessel.

6. The next subcategory within Personnel Policies is **Recordkeeping**. *See* WAC 317-21-255. Recordkeeping contains two elements: training records and work hour records. This subcategory is included to ensure that documentation is available to confirm that required training is accomplished and hours worked do not exceed the limitations.

C. *Management Practices*

1. *Management oversight* is a critical part of any safety and environment protection management program. *See* WAC 317-21-260(1). It was highlighted separately to ensure that while a company is obtaining certification for its management system, owners and operators are actively monitoring vessel operations, personnel training, technological advancements and management practices.

2. The next element is the *management program. See* WAC 317-21-260(2), (3). Tanker owners and operators must implement a safety and environmental protection management system. The Washington standard requires that all tankers be certified, along with the operating company for those ships, according to either the International Safety Management (ISM) Code or a comparable code, or it can be done internally. The Washington standard lists the comparable codes as the International Ship Managers Association Code of Ship Management, Det Norske Veritas Safety and Environmental Protection Management System and Lloyd's Register Quality Management System.

If a company chooses to implement an internal management program, it must contain a policy statement from the company's chief executive officer that commits the company to assuring personal safety and prevention of pollution; an organizational scheme that facilitates communication; weekly shipboard safety meetings; an accident and pollution incident review and analysis program; and a performance measurement system to evaluate progress towards the safety and pollution prevention goals established in the company policy statement.

In addition, in order to ensure quality control of the certification process, Washington requires that external audits be performed by a member of the International Association of Classification Societies or IACS. Washington allows companies to submit a prevention plan that indicates that they are working on their certification under one of the listed codes with a completion date of no later than July 1998, which is IMO's completion date for certification under the ISM Code.

3. Like management oversight, *vessel visitation* is a critical element of any management program, but in the interim time period while companies are being certified, OMS and the Advisory Group believed it was important to list this separately, so that it does not get overlooked. The Washington standard, which is derived from a review of Phase 2 prevention plans, requires vessels to be visited at least quarterly by company managers. The purpose of these visits is to give the senior officers on board the vessel an opportunity to highlight problems for management and to give management an opportunity to discuss procedures and issues with senior officers on vessels.

4. The final element of management is *preventative maintenance*. There are two parts of this element. Washington standards call for a preventative maintenance system for

covered vessels, which includes planned maintenance, annual inspections of major equipment and a supporting supply system to ensure that spare parts necessary to keep vessel equipment operational are available. In addition, it requires a critical area inspection program similar to that required for U.S. tankers in the Trans-Alaska Pipeline System (TAPS) trade. The critical area inspection program is very similar to the IACS enhanced hull survey program.

The objective is to identify critical areas of the vessel's hull and piping systems that are prone to corrison or cracking, and to deal with those areas through more frequent inspections, thickness measurements, and an enhanced corrosion program. The Washington standard supports introduction of an inspection standard for all critical structural portions of the vessel.

All of the elements in the management category are designed to break the chain of human errors that could endanger a ship due to grounding or collision, or due to structural failure. Management elements address factors that vessel crews are not able to resolve without company support.

* * * *

IV. *RECORD OF ACTUAL COMPLIANCE WITH BAPs*

OMS has witnessed excellent compliance with its prevention plan and BAP standard requirements in chapter 317-21 WAC, having received over 70 plans from tank vessel owners and operators covering fleets of vessels from one to over 40. *See* Exhibits 30 and 31. A copy of a Phase 3 Plan is attached at Exhibit 32. Many of these plans are from Intertanko members who have complied with the requirement to submit them and many have been found complete, meaning that each BAP standard has been addressed and documentation demonstrating compliance has been provided by these vessel

owners or operators. OMS is in the process of reviewing the compliance documentation for each plan. OMS has employed a very liberal and common sense waiver policy to facilitate and encourage industry compliance with the BAP standards. Single voyage waivers, commonly known in the industry as "Silver Bullet" waivers, have been granted to companies who have claimed ignorance of the prevention plan requirement or have been unable to complete their plan before a vessel covered by the plan arrived in Washington waters. Silver Bullet waivers were granted throughout the Phase 2 plan period (9/93 - 12/94) and continue to be granted in Phase 3.

In addition, OMS has granted many long-term (up to five years) waivers for tank vessels carrying non-petroleum products such as molasses, tallow, and chemicals. OMS has also granted waivers for specific plan elements for good cause, such as conflicts with local laws or existing collective bargaining agreements. OMS has handled all waiver requests consistently and fairly to help ensure a level playing field between competitors.

V. *TANKER ROUTES THROUGH WASHINGTON WATERS*

Most tanker traffic in Washington is through Puget Sound. There is limited tanker traffic in the Columbia River, but there is considerable tank barge traffic in the river. The route of tanker traffic can be followed on Chart 18400, entitled "Strait of Georgia and Strait of Juan de Fuca". *See* Exhibit 33. Tanker traffic generally follows the west coast of Vancouver Island when it's arriving from Alaska, or follows what is called a great circle route, if it's coming from the Pacific Rim. It will arrive in the vessel traffic separation scheme in the vicinity of Swiftsure Bank, which is at the lower left end of Chart 18400. The vessel traffic system is very much like a divided highway, with the magenta, or

purple, area on the chart indicating the separation zone, which is like a median divider, and traffic lanes being indicated by additional purple dashed lines. Tanker traffic would normally follow the in-bound lane, indicted just south of Swiftsure Bank on the chart, where the arrow points to the right or east. As a tanker continues east, it passes through a precautionary area. It is still under the management of Tofino Vessel Traffic Service at this time. As it passes Buoy J or Buoy Juliet, and enters Washington waters, it passes to the control of Vessel Traffic Service Puget Sound in Seattle, WA.

The traffic lanes at this point pass relatively close to such hazards as Duntz Rock and Cape Flattery, and Neah Bay. Continuing southeast in the inbound traffic lane, the tanker will stay on the same heading for approximately three hours, and then just past longitude 124 west, the vessel will come to a turn to the left to take it almost due east. This area is the site of the grounding of the Matsukaze in 1988. A mate on that inbound Japanese tanker fell asleep, did not make the turn, and the vessel simply steered straight into the beach at Crescent Bay while the mate slept, in spite of Vessel Traffic Service (VTS) warnings. VTS has established a call-in point at the turn, but nonetheless, if a mate is alone on the bridge and is asleep, the call-in point will not prevent future incidents such as the Matsukaze grounding. The OMS requirement for three deck officers while in state waters in restricted visibility will eliminate the possibility of a fatigued officer acting independently and a vessel on auto-pilot going right through a turn and having an accident such as a grounding or a collision.

Continuing east, tankers pass Crescent Bay, to the area between Port Angeles and Victoria. After passing Buoy VF (the names of buoys are provided in quotation marks next to the symbol for buoy on the chart), VF is due south of Race

Rocks, which lies at the southernmost point of Vancouver Island, southwest of Victoria, B.C. At Buoy VF, a tanker enters another precautionary area and turns south, to pick up a pilot at Port Angeles, WA. The pilot is picked up just north and east of the Port Angeles Harbor. The tanker then proceeds toward Buoy R, if it is headed for one of the four refineries in the North Sound, or heads for Buoy S, if it is going to transit Puget Sound southbound to Tacoma, where two additional refineries are located.

After about an hour, the tanker will pick up its escort off New Dungeness. The escort will stay with the tanker until it is moored at the refinery. As the chart illustrates, the tanker has transited 70 miles without a pilot, and almost 85 miles without an escort.

Tankers bound for the northern refineries proceed up the inbound traffic lane past Buoy R. The next buoy is Buoy RA. Buoy RA lies between Hein Bank and Smith Island. At this point, the waterways become narrower and more congested. The area around Hein Bank is one of the most favored fishing grounds in all of Puget Sound. The tanker continues to the northeast, shoots the gap between Davidson Rock and Lawson Reef, where obstacles lie just outside the traffic lanes. A steering casualty or loss of propulsion during the rest of the transit is especially serious. At this point, the vessel beings to turn north and enter Rosario Strait.

As illustrated on the chart, Rosario Strait has no traffic lanes. It is too narrow for traffic lanes. As a result, one-way traffic for tankers is imposed in this area. If a tanker is outbound in Rosario Strait, an inbound tanker will not be allowed to enter Rosario Strait. If the tanker is bound for one of the two Anacortes refineries, it will proceed up to the vicinity of Shannon Point, turn right, pass through a very narrow channel called Guemes Channel, and proceed into

Padilla Bay, where the refineries are located. This area, Guemes Channel, has been identified in the OPA 90 planning process as the worst case scenario oil spill in the Captain of the Port Puget Sound area. The currents in Guemes Channel are extremely strong, and in addition, the area is subject to frequent fog and a significant range of tides.

If the tanker is not bound for the Anacortes refineries, but instead to the Cherry Point and Ferndale refineries, it will continue all the way through Rosario Strait, passing by such obstacles and obstructions as Peapod Rocks and Lummi Rocks. Those refineries are located to the east, or to the right, of Alden Bank, at the north end of Rasario Strait, in the Strait of Georgia, at the center right of Chart 18400.

In the case of tankers bound for the four northern refineries of Washington, the most hazardous area from a navigational and congestion standpoint is Rosario Strait. For tankers bound for Canada, the most hazardous area is the U.S. waters of Haro Strait and Boundary Pass, also from both a navigational difficulty and congestion standpoint. For tankers bound south through Puget Sound, congestion is the biggest problem. There is less navigational difficulty, although the run is longer. For all tankers inbound through the Strait of Juan de Fuca, the problem area is the western end of the strait, where the vessels have neither pilots nor escorts while they transit an area which is not particularly difficult from a navigational viewpoint, but has persistent fog and is heavily fished, causing congestion problems. English language communication difficulties are also severe in the area west of Port Angeles, the area transited before the State Pilot boards. Vessel deck watch officers with limited English speaking capability have trouble communicating in this area with the Vessel Traffic Service system, as well as with other vessels

when they are required to talk to them to arrange a safe passage in collision avoidance situations.

Tankers southbound through Puget Sound to Tacoma transit broader waterways that are frequently more congested than the ones going north toward Anacortes or Cherry Point refineries. Chart 18440, entitled "Puget Sound" is attached as Exhibit 34. Tankers have a longer transit going south. From the pilot station at Port Angeles to the pier at Tacoma is approximately an eight-hour run for the average tanker. The transit south to Tacoma is made more difficult by crossing traffic, particularly ferries crossing the traffic lanes on east-west routes, and the proximity of obstructions close to the western side of the southbound traffic lane.

In summary, the Puget Sound area is considerably more difficult to navigate than Prince William Sound where the Exxon Valdez disaster occurred. The Valdez Narrows is the only navigationally challenging area in Prince William Sound. The remainder of the transit through Prince William Sound is uncomplicated and not subject to the congestion, the persistent fog, and the proximity of obstructions such as is present in Washington waters.

VI. *POTENTIAL INCREASE IN FOREIGN TANKER TRAFFIC*

On April 28, 1996, President Clinton signed a determination that the lifting of the ban on the export of Alaska North Slope crude oil was in the national interest. *See* Exhibit 35. As a result, the transportation for export of Alaska North Slope crude oil will be permitted on U.S. flag ships. This is the first time that Alaskan oil has been transported anywhere but to the United States or U.S. territories.

OMS is unaware of any projected decline in the refining capacity or production at the six Washington refineries.

Normally, very nearly all of their oil is from the Alaska North Slope. Occasional loads come from places like Venezuela, but primarily the crude oil for Washington's refineries has come from Alaska.

The Jones Act requires that U.S. flag vessels carry oil from Alaska to other United States ports, including Washington ports. If Alaskan oil is diverted due to export, then there is an increased possibility that foreign oil will be imported to Washington to keep the refineries operating at capacity and to make up the difference if enough Alaska North Slope oil is exported. This foreign oil will come in on foreign tankers. Foreign tankers are, in my opinion, inherently less safe transiting Washington waters than U.S. flag tankers.

The basis for my opinion is that up to 80 percent of marine accidents are caused by human error. (Refer to Exhibit 27.) Generally, U.S. seamen are subject to more stringent human factor requirements than the crews of foreign vessels. These include OPA 90 work-hour restrictions and more stringent training regimes. In addition, there is an inherent language difficulty for non-English speaking or limited English-speaking crews. Language difficulties have been a critical factor in several near misses and incidents in the Strait of Juan de Fuca, particularly west of Port Angeles, prior to the arrival of a state-licensed pilot on-board the vessel. These incidents have been recorded by the U.S. Coast Guard Vessel Traffic Service in Seattle, as well as the Canadian Coast Guard Vessel Traffic Services in Tofino and Vancouver, B.C. In fact, a language difficulty form is used by the Vessel Traffic Service to identify vessels on which the crews have difficulty communicating in English.

During my Coast Guard career, I was directly involved in the development of these procedures to address language difficulties. OMS is concerned that the potential for additional

foreign tanker traffic will only exacerbate a situation in which more and more vessel crews are transiting Washington waters with limited or nonexistent English-speaking skills. This situation has had a severe impact in the past and will continue to have a severe impact on the safety of navigation, particularly in the western end of the Strait of Juan de Fuca.

The trend toward foreign flag vessels is also evident in the non-tank vessels. This is due to the decline in the U.S. Merchant Marine.

VII. *RECENT OIL POLLUTION HISTORY IN WASHINGTON WATERS*

The BAP standards were not developed to address a hypothetical situation. They were developed to address near misses and spills that have occurred in Washington during the last decade and to implement measures that will help reduce the risk of those incidents and spills occurring in the future. In March 1984, the tanker Mobil Oil grounded on a rock in the Columbia River, resulting in a 200,000 gallon oil spill. In December 1984, the tanker ARCO Anchorage grounded in Port Angeles Harbor and spilled 239,000 gallons of Alaskan crude oil. In April 1988, the tanker Matsukaze grounded at Crescent Bay, west of Port Angeles, causing extensive damage to the vessel, but fortunately no oil spillage. In April 1989, the tanker Exxon Philadelphia lost power and drifted off the mouth of the Strait of Juan de Fuca with a load of 23,000,000 gallons of Alaskan crude oil. It took approximately five hours for a tug to reach the tanker, which was eventually towed to Port Angeles. In September 1989, the tanker Exxon San Francisco lost power while outbound in the Strait of Juan de Fuca. That vessel also was returned under tow to Port Angeles. In October 1990, the tanker Contessa flooded at sea during inclement weather. The master jettisoned 81,000 gallons of oil to stay afloat. This incident occurred off

the mouth of the Columbia River. In June 1991, the tanker ARCO Texas ran aground at Ediz Hook in Port Angeles. Fortunately, no oil spill occurred from that casualty. The above incidents are more fully described in Exhibit 36, the list of vessel casualties described in the Final Report of the Emergency Towing System Task Force. A map of major oil spills in Washington waters which have occurred prior to November 1991 is attached at Exhibit 37.

There have also been several major tank barge spills, including one after the implementation of the BAP standards, in which it was determined that if the master had been following the company procedures established in compliance with BAP standards, the grounding and spill of Crowley Barge 101 would not have occurred.

I have read the foregoing Affidavit and declare it to be true and correct to the best of my knowledge, information and belief.

DATED this 3rd day of June, 1996.

/s/ Stanley J. Norman
STANLEY J. NORMAN

Signed or attested before me, *Christene E. Winkelman* by *Stanley J. Norman*.

DATED this 3rd day of June, 1996.

/s/ Christine E. Winkelman
NOTARY PUBLIC, in and for the
State of Washington.
My commission expires on: 6-30-97

EXHIBIT 11

STATE OF WASHINGTON

OFFICE OF MARINE SAFETY

June 27, 1994

TO: Management Team

FROM: Stan

SUBJECT: COAST GUARD HEADQUARTERS TRIP REPORT

1. I attended the U.S. Working Group Meeting on Standards for Training and Watchkeeping on June 24, 1994, and briefed Coast Guard officials on Tank Vessel Best Achievable Protection (BAP) standards on June 25, 1994. Dr. Jack Harrald attended both meetings with me.

2. Overall, the trip was worthwhile and successful. We are definitely on target with the BAP standards. Following the meetings, Jack and I met with Captain Basel of the Coast Guard and agreed that we are approximately 3-5 years of the Coast Guard, and consequently, the international community. The Coast Guard does not intend to oppose our rulemaking, but to observe and learn, as they will be introducing similar federal standards in the next couple of years.

* * * *

EXHIBIT 15

STATE OF WASHINGTON

OFFICE OF MARINE SAFETY

December 1, 1994

TO: Barbara Herman, Director

FROM: Bruce Sutherland, Policy & Planning Program Director

SUBJECT: HEARING EXAMINER'S REPORT ON PROPOSED TANK VESSEL OIL SPILL PREVENTION PLAN RULES (WAC 317-21)

1. The proposed rules for Tank Vessel Best Achievable Protection Oil Spill Prevention Plans were published in the State Register on September 21, 1994. Two Public Hearings were held and written comments were accepted through November 7, 1994. The Public Hearings were held in Vancouver, Washington on October 18, 1994, and in Seatac, Washington, on October 20, 1994. Both hearings were held in the evening to encourage attendance and participation.

2. These rules are the result of more than one year of effort by Office of Marine Safety (OMS) staff and the Tank Vessel Best Achievable Protection (BAP) Advisory Group. In November and December 1993, OMS staffreviewed more than seventy comprehensive oil spill prevention plans submitted by tank vessel owners and operators. Model procedures and practices were taken from the plans and presented to the Advisory Group as a working draft. The Advisory Group was composed of representatives from the private and public sectors. Industry representation included tanker managers, tanker operators and tank barge operators.

The Advisory Group met three times to develop the BAP standards and established sub-groups of subject matter experts to address complex issues such as training, work hours, and engineering procedures. OMS staff then converted the BAP standards to draft rules. The Advisory Group met two additional times to thoroughly review the draft rules before they were published as proposed rules. With very few exceptions, which are noted in the specific comments by Advisory Group members in paragraph 6 of this report, these rules are the unanimous recommendations of this Advisory Group representing the industry, the environmental community, and government.

* * * *

c. AWO, BP, Captains Prabhu and Dadlani, Foss Maritime, PSSOA, TI, and WSPA Comment: The proposed rules duplicate many international and federal standards.

Friends of the Earth, Northwest Indian Fisheries Commission and SeaRiver Comment: Redundant regulations are necessary to protect the marine environment and enforce international standards. The rules are workable as proposed.

OMS Response: While many sections of the rules appear to duplicate international and federal standards, they are in fact different in small but significant ways. For example, work hour restrictions for tanker personnel are identical to the federal restrictions but apply to all tankers in Washington waters, not just U.S. flag tankers. Another example is tanker position fix interval. International standards require position to be determined "frequently". The proposed rules require constant monitoring of position and recording of position at least every 15 minutes while in Washington waters. Thus, the rules have defined "frequently" for Washington state. To the

extent federal rules are adopted, it is an effort to bring consistency to the federal and state regulatory regimes, a goal encouraged by industry since OMS' creation.

* * * *

d. PSSOA, Texaco, and WSPA Comment: The policies, procedures and practices of one company should not be adopted and required industry-wide due to the wide variety of management systems in use in the industry.

OMS Response: The BAP Standards do not represent the policies of any one company. The rules are general in nature and represent internationally recognized and recommended practices in most cases. The rules codify and clarify practices developed and recommended by the industry that are current practices of many companies.

* * * *

(2) Illicit Drugs and Alcohol Use

(a) Test program

ARCO, BP, INTERTANKO, and TI Comment: OMS should adopt federal test standards and not create its own.

WCS Comment: Pre-employment alcohol testing may have limited value.

National Audubon Society and People for Puget Sound Comment: Zero tolerance policy and all measures necessary to ensure compliance are strongly endorsed.

OMS Response: The rules only differ from the federal testing regime in one respect: pre-employment and random alcohol use testing are required. This requirement was included at the request of the Advisory Group which adopted a zero tolerance policy for drug and alcohol use on board tank vessels in

Washington waters. Companies that have conducted pre-employment alcohol testing in the past report that there have been a number of positive tests which have acted as an effective screening tool for hiring.

* * * *

(5) Language

INTERTANKO Comment: Current international requirements for English proficiency are adequate.

BP Comment: Not all deck officers need to be proficient in English.

National Audubon Society, People for Puget Sound, and Washington Environmental Council Comment: Strongly support the proposed rules which clearly identify the persons on foreign vessels that must be proficient in English.

OMS Response: The International Convention on Standards for Training, Certification, and Watchkeeping for Seafarers (STCW) requires all deck officers to be reasonably proficient in English. OMS English proficiency requirements are consistent with the STCW.

EXHIBIT 27

US. Department of Transportation

United States Coast Guard

PREVENTION THROUGH PEOPLE

The Coast Guard announces the establishment of a task group formed by the Chief, Office of Marine Safety, Security and Environmental Protection to assess how to improve safety and pollution prevention through improvements in areas where people are the major factor in accidents. The task group's purpose will be to develop a long-term strategy for a Coast Guard "Prevention Through People" program which stresses solutions outside the regulatory process.

The analyses of marine casualties which have occurred over the past 30 years have prompted the safety regime of the international maritime community to evolve from one based primarily upon technical requirements, to one which recognizes the importance of the human element in the system. This analyses indicates that 65 to 80 percent of casualties are caused by people. However, the maritime safety and pollution prevention programs spend 80 percent of the available resources addressing design requirements and technical "fixes" to eliminate the "human element" or to provide redundancy and alarms which can actually result in the need for increased technical skills of the operating personnel. Only 20 percent of our resources are expended on people issues. Consequently, rebalancing is necessary to better address the root causes of safety and pollution problems or to address them properly at an adequate level while refocusing the saved resources in other areas.

Historically, the international maritime community has approached maritime safety from a predominantly technical

perspective. The conventional wisdom was to apply engineering and technological solutions to promote safety and minimize the consequences of marine casualties. Accordingly, international standards have addressed equipment requirements such as the type and amount of lifesaving and firefighting apparatus required on board. Design requirements such as protectively located segregated ballast tanks, double hulls, and improved steering gear standards have been adopted to make the operation of tankers safer and to minimize the extent of pollution in the event of a casualty. Innovations in structural fire protection engineering have significantly improved the fire safety of today's modern cruise vessels. State-of-the-art electronics have had a profound effect on the accuracy of navigation. Finally, advances in materials and computer assisted construction techniques have improved quality and reliability throughout the industry.

Despite these engineering and technological innovations, significant marine casualties continue to occur. To further reduce casualties, the role of "human error" in the maritime safety equation has been evaluated. The term "human error" may be broadly defined as the acts or omissions of personnel which adversely affect the proper functioning of a particular system, or the successful performance of a particular task. As indicated, recent studies have suggested that in excess of 80 percent of all high-consequence marine casualties may be directly or indirectly attributable to "human error." The term "human factors" may be defined as the study and analysis of the design of the equipment, and the interaction of the equipment and the human operator, and most importantly, the procedures the crew and management follow. The purpose of studying human factors is to identify how the crew, the owner, the classification societies, and the regulatory bodies can each work to sever the chain of errors which are associated with every marine casualty.

Consequently, the international maritime community has started to emphasize participatory shipboard management. As noted by the International Chamber of Shipping and the International Shipping Federation, "the task facing all shipping companies is to minimize the scope for human decisions to contribute, directly or indirectly, to a casualty or pollution incident. Decisions made ashore can be as important as those made at sea, and there is a need to ensure that every action affecting safety or the prevention of pollution, taken at any level within the company, is based upon sound understanding of its consequences."

There is a clear need to critically address people-issues. The issues must be addressed, not only from the traditional man and machine interface and ergonomics aspects, but must also include an assessment of entire processes including navigating the vessel, cargo loading and unloading, and responding to emergencies.

The Coast Guard study team will consult with industry, including vessel operators and crew and cargo transfer operators, to obtain insight on where processes or people-issues have a potential for improved safety or efficiencies, either because of changes by the Coast Guard or by industry. Small study groups may be formed, if appropriate, and public meetings may be held to get input from a broad interest base. If the Coast Guard decides to hold a public meeting, the date and time will be announced by a later notice in the *Federal Register*.

The Coast Guard invites suggestions and recommendations. Interested persons submitting comments should submit them to CDR Craig Bone, Commandant (G-MS), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593-0001, by telephone at (202) 267-6827, or by fax at (202) 267-4547.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR

CAUSE NO. C95-1096

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,

v.

MIKE LOWRY, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MCEACHRAN, Prosecutor of Whatcom County; DAVID NEEDY, Prosecutor of Skagit County; JAMES KRIDER, Prosecutor of Snohomish County; and NORMAN MALENG, Prosecutor of King County,
Defendants,

and

THE WASHINGTON ENVIRONMENTAL COUNCIL; THE NATURAL RESOURCES DEFENSE COUNCIL; and OCEAN ADVOCATES, INC.,
Intervenors.

AFFIDAVIT OF MEGAN N. DETHIER
(Shoreline Habitats)

STATE OF WASHINGTON)
) ss.
COUNTY OF SAN JUAN)

I, MEGAN N. DETHIER, being first duly sworn, upon oath, deposes and says:

1. I am over 18 years of age and competent to testify herein.

2. I am a marine ecologist employed by the University of Washington. I received my PhD in 1981 from the UW Dept. of Zoology. My PhD work as well as my subsequent 15 years of research have been devoted largely to the shoreline ecology of the state of Washington. For part of this time I developed a marine habitat classification system as a contract for the Washington DNR; this system provides a 'language' to describe shoreline in the marine and estuarine waters of the state. I have also done extensive field work, performing both basic marine ecological work aimed at elucidating the way organisms interact with their environment, and more applied work in terms of gathering baseline data on abundances of plants and animals on the state's shores. This kind of data is critical in the event of oil spills or other external events, so that we have information on how natural communities looked and functioned before such events occurred. I have also reviewed literature on the *Exxon Valdez* and other oil spills, and performed spill impact studies on the Olympic peninsula following the *Nestucca* oil spill in 1988-9. My resume includes 18 papers in peer-reviewed professional journals, and 9 reports on shoreline ecology written for state and federal agencies.

3. Shoreline habitats can be defined as types of physical environments, characterized by substrate type, wave exposure, and other factors, that are occupied by fairly predictable sets of plants and animals. Examples are mud flats, sandy beaches, and rocky shores. Each of these categories can be divided more finely in an ecologically realistic manner, for example highly wave-exposed rocky

shores have different communities of organisms living on them than wave-sheltered rocky shores. The marine and estuarine habitat classification systems that I wrote for Washington has over 60 such categories, including subtidal (permanently-submerged) habitats as well. This system is proving useful in mapping the shorelines of the state, preparing for oil spills, and making decisions on potential locations of marine preserves. Each shoreline type can be said to provide different "functions" to human societies and to biological ecosystems; for instance, sandy beaches provide wonderful recreational opportunities while mudflats with eelgrass provide habitat for juvenile crabs and salmon. The discussion below reviews some of these functions as well as the intrinsic values of the habitats themselves.

The coastline of Washington state is characterized by high habitat diversity. The outer coast of Washington has shoreline habitats consisting largely of wave-exposed rocky headlands, separated by short to long stretches of sandy beaches or mixes of gravel and sand. It also includes two very large ecologically rich estuaries (Grays Harbor and Willapa Bay), as well as the Columbia River estuary. In addition, Washington waters include the "inland sea" of Puget Sound, characterized by low wave exposure but relatively high currents, and containing a rich mix of habitat types from calm, muddy bays to open rocky shores. Marshes and other high-shore wetlands, while suffering the degradation and disappearance common all over the country, can still be found both in Puget Sound and in the outer coast estuaries. Finally, the Strait of Juan de Fuca comprises a transition zone beween the highly wave-exposed coastal region and the quieter Puget Sound waters.

4. All of the shoreline types of Washington could be deemed as having some "value", both intrinsic and in terms of human usage. Intrinsic or ecosystem-level values include:

a. *Biodiversity*. Washington's shorelines are among the most diverse in the U.S.; several hundred species of seaweeds and animals, mostly invertebrates, can be found in these habitats. This diversity relates in part to the productivity of the region (see below), and to the fact that Washington is in a transition zone between two biogeographic provinces, with species present from both. In addition, the undisturbed nature of some areas of shoreline (especially on the outer coast) helps maintain this diversity. We are increasingly recognizing that such species diversity has intrinsic value; chemicals for treating cancer are found in obscure marine sponges, little crustaceans turn out to be important fish food, and the basic complexity of natural systems may well provide a buffer against permanent disruption by human disturbance. As with tropical rainforests, events that threaten this biodiversity may have long-term and large-scale consequences that we cannot yet define.

b. *Productivity*. The marine and estuarine waters of Washington are among the most productive in the U.S. Seasonal (summertime) upwelling of nutrient-rich waters plus inputs of nutrients from the estuaries support this productivity by allowing large plankton blooms and rapid algal growth. This productivity, in turn, supports diverse and dense populations of animals, including many commercially important species. While much of this productivity comes from offshore and subtidal plankton and kelp beds, shoreline populations of seaweeds, eelgrass, and microscopic algae also contribute substantially to local productivity.

c. *Nursery And Feeding Areas for Other Species*. Many shoreline habitats are used for critical life-processes by

species that we think of as living 'elsewhere', such as subtidal fishes, marine mammals, and birds. Examples of these uses include: gravel beaches are used as spawning areas by surf smelt; low-shore eelgrass beds are used as nursery areas by commercially important crabs, and they provide protection from visual predators and a rich food source for juvenile salmon and other fishes; rocky shores provide haul-out areas for seals and sea lions – these places are important for resting and warming for these animals; extensive mudflats provide critical feeding areas for numerous species of shorebirds that consume the small worms and crustaceans in the mud – the coastal estuaries, in particular, are essential stopping and 'refueling' areas for millions of waterbirds migrating up and down the west coast.

Humans use shorelines in a variety of ways, and have done so in the Pacific Northwest for over a thousand years. Such uses include:

1) Education and Research. Groups from the preschool to the postgraduate level use Washington shoreline as natural classrooms or as collecting sites for research purposes. Public beaches such as state parks are particularly heavily used in this regard.

2) Commercial harvest of edible species. Both Native and non-native fisherman harvest organisms from shorelines; at this time, the primary intertidal (as opposed to subtidal) commercial harvests are for clams (hardshells) and oysters. Other harvested species include sand shrimp, and there is discussion of future commercial harvest of other species such as seaweeds, gooseneck barnacles, and mussels.

3) Tribal subsistence harvest. Many types of shoreline organisms are used by members of Northwest tribes for subsistence or ceremonial purposes.

4) Recreational Harvest. Washington shorelines are increasingly used by the public for recreational harvesting of numerous edible marine organisms, including clams, mussels, whelks, crabs, seaweeds, and other species. The increasing consumptive use of organisms on Puget Sound and other shorelines has been great enough to lead to new harvesting and licensing regulations.

5) Non-consumptive Recreational Use. Both tourists and Washington residents use the shorelines of Puget Sound and the outer coast. Many State and National parks incorporate some shoreline area. People use these regions for sunning, walking, fishing, wildlife-watching, and other forms of relaxation. Boaters and SCUBA divers use these areas for water access.

5. *Sensitivity of Shoreline Habitats to Oil Spills.*

Most or all of the 'values' of shoreline habitats described above can be compromised by spilled oil. Thus virtually all the shorelines in Washington are 'sensitive' to oil in some way, from mudflats that have no harvestable species but are used for feeding by many bird species, to stretches of sandy beach that are ecologically depauperate but used by thousands of visitors.

All forms of *human use* are clearly jeopardized by oil coming ashore. Recreational use of oiled beaches is likely to be low, and cleanup of beaches may alter the character or appearance of the shore (e.g., by bulldozing away oiled sand) so that normal use may not return quickly. Recreational and subsistence harvest of all species should be curtailed after a spill; even if target organisms are not killed, tissues are likely to be tainted by oil, and some species (e.g., clams) retain oil in their tissues for many months. In addition, if oil is incorporated into the sediment (for instance in a mud flat),

research has shown that animals will be constantly recontaminated by oil leaching out of the sediment. Commercial harvests are generally shut down entirely after a spill; in Prince William Sound, the possibility that fish might be tainted by oil drove down prices so that many fisherman stopped fishing following the *Exxon Valdez* spill.

Intrinsic values of shoreline habitats are also damaged by spills. Most types of marine invertebrates, seaweeds, and seagrasses are known to suffer acute or sublethal damage from oil, even at very low concentrations. Heavy oils can smother invertebrates and plants, and toxic oils can kill most species outright. Juvenile stages of animals are particularly vulnerable. Large plants such as eelgrass and kelp that provide habitat for other organisms can be damaged, leaving other species 'homeless' even if they survive the oil themselves. While there have been statements in the literature about intertidal organisms being 'hardy' and thus able to survive oil spills, the data argue against this assumption. While these species have evolved to deal with drying, freshwater runoff, freezing, and other physical extremes, oil spills are not part of their evolutionary history.

There are inadequate data on recovery time of shoreline habitats from spills to make firm generalizations, but many habitats may suffer long-term damage. The exception may be sandy beaches in highly wave-exposed areas; here, the oil is likely to be removed quickly by wave action, and while the organisms living there (mostly small worms and crustaceans) are likely to suffer high mortality, most of them will recolonize clean sand fairly quickly from other areas. In contrast, wave-exposed rocky shores may similarly be 'cleaned' quickly by natural processes, but here there are species that are long-lived (up to 20 years for mussels) and slow-growing, and that sometimes do not disperse well from

undamaged areas. Thus actual recovery of rocky-shore communities to their pre-spill state may take years. This is especially true because of the high biodiversity of these shorelines; if rare species are killed, they may not recolonize for a long time. Salt marsh and mud flat habitats can be severely affected by oil because it penetrates and persists in sediments, potentially resulting in long-term toxic effects (over 20 years in one well-studied case in Massachusetts: Teal et al., 1992)

A 1992 study for the U.S. Coast Guard sought to define areas of the Washington and Oregon coasts that would be particularly sensitive to oil spills, based on habitat sensitivity, commercial and non-commercial value to humans, presence of 'special species' such as marine birds and mammals, and other parameters. It delineated 8 large "particularly sensitive" areas in Washington state, including regions both in Puget Sound itself, in the northern inland waters, and on the outer coast. Thus there are no substantial parts of Washington's navigable waters where oil spills are not of concern for the health of shoreline habitats.

Reference:

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/s/ Megan N. Dethier
MEGAN N. DETHIER

Signed or attested before me, *JoAnn R. Baker*, by _____.

DATED this 31st day of May, 1996.

/s/ JoAnn R. Baker

NOTARY PUBLIC, in and for the State of Washington.

My commission expires: 3-28-99

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR

CAUSE NO. C95-1096

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,

v.

MIKE LOWRY, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MCEACHRAN, Prosecutor of Whatcom County; DAVID NEEDY, Prosecutor of Skagit County; JAMES KRIDER, Prosecutor of Snohomish County; and NORMAN MALENG, Prosecutor of King County,
Defendants,

and

THE WASHINGTON ENVIRONMENTAL COUNCIL; THE NATURAL RESOURCES DEFENSE COUNCIL; and OCEAN ADVOCATES, INC.,
Intervenors.

AFFIDAVIT OF RONALD M. THOM
(Coastal Aquatic Vegetated Habitats in Washington State)

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

I, Ronald M. Thom, being first duly sworn on oath, depose and state as follows:

1. I have been a Senior Research Scientist at Battelle Marine Sciences Laboratory, Sequim, Washington, since 1990. I received a Bachelors degree in Biological Sciences in 1971, Masters degree in Biology in 1976, and Ph.D. in Fisheries in 1978. My 21 years of professional experience includes employment as a marine biologist (Los Angeles County 1971-1974; U.S. Army Corps of Engineers 1980-82), university teaching (1985-present), and university research (University of Washington, 1978-80, 1982-1990). I have been employed by local, state, and federal governments as a biologist, and has served on a number of professional committees. In 1985, I was elected chair of the Environmental Protection Agency's Puget Sound Estuary Program Technical Advisory Committee and served in that capacity for five years. In 1990, I was invited to present a paper on habitat restoration to NOAA's Conference on Restoring the Nation's Marine Environment. This conference initiated NOAA's program in Marine Restoration. In 1993, I was invited by the British Columbia/Washington Environmental Cooperation Council to produce a joint paper with a Canadian scientist on the status of coastal wetlands and habitats in the Washington and British Columbia Region. Based largely on this paper, the British Columbia/Washington Marine Science Panel eventually recommended habitat protection as the highest priority issue among all marine environmental issues in the region reviewed by the panel. I also serve as an Affiliate Faculty at the University of Washington School of Fisheries and Adjunct Faculty at Western Washington University. I teach courses on Wetland Restoration at the University of Washington Extension Program on Coastal Ecosystem Management and Wetland Ecology for Western Washington University at the Port Angeles Center.

I have managed over 100 research projects involving coastal habitats and ecosystems. My research includes benthic primary production and nutrient fluxes; seagrass ecology; physiology of estuarine plants; the effects of pollution on nearshore marine systems in California, Washington, and Alaska; habitat construction and restoration of marine and estuarine systems; effects of climate change on estuarine systems; and ecology of fisheries resources in nearshore systems. Since 1974, the vast majority of my research has been in Puget Sound and the coastal estuaries of Washington. My doctoral dissertation was on the effects of sewage pollution on marine algae near Seattle. In 1992, research led by me produced the first study to document the effects of oil on bull kelp. This study was conducted to investigate natural resource damage assessment of the Tenyo Maru oil spill.

Since 1974, I have written over 100 documents including technical reports, peer-reviewed articles, and book chapters. In addition, I have given well over 200 professional presentations on my research. My publications for the years 1994-1996, only, are listed here:

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I. *Introduction*

The objective of this affidavit is to describe the major coastal habitats occurring along the shorelines of Washington State, in particular those in the inland waters. The review is directed at the types of vegetated habitats that would be vulnerable to direct exposure to oil spilled into the marine and estuarine waters of the State. The inland waters include the Strait of Juan de Fuca, the San Juan Islands, Puget Sound, Hood Canal, as well as coastal estuaries such as Grays

Harbor, Columbia River, and Willapa Bay. This reviev is based upon personal experience and research, as wel as published and unpublished information reviewed by the auhor and cited in his written documents.

II. *Potential Areas of Exposure*

The vegetated habitats that could be directly exposed to spilled oil occur on shorelines from approximately the upper limits of the spray zone at about +4 m relative to Mean Lower Low Water (MLLW) down to a subtidal (i.e., just below the intertidal zone) depth of approximately -1 m MLLW. The elevation range includes the intertidal zone (approximately -1 to +3.5 m MLLW), which is coveredand exposed as the tide rises and falls. The lower depth limt of vegetated habitats is determined by the amount of lightthat reaches the bottom. Plants will not be present where ight cannot adequately support their photosynthesis. Becaus oil floats on the surface of the water, the intertidal zone ha the greatest probability of being impacted by spilled oil that impacts a shoreline. However, heavier fractions of oil nay sink or become suspended in the water and impact subidal habitats. Strong winds and surf can potentially carry oilinto the spray zone which occurs immediately above the uper limits of the intertidal zone.

Although most direct exposure to oil would be in pen marine and estuarine areas where salinities range from aout 35 parts per thousand (ppt) to about 5 ppt, the influence o the tide can reach well up into a river where water salinitie are 0 ppt.

III. *Habitat Types and Distribution*

This is a variety of vegetated coastal habitat type in Washington State. Although there are a numbe of classification systems for these habitats, the eight major

vegetated habitats in the areas include: seaweed beds, mudflats, sandflats, seagrass meadows, kelp forests, salt marshes, brackish marshes, and tidal fresh marshes. Seaweed beds occur over the broadest range of elevations, from the splash zone down to subtidal depths. Mudflats and sandflats occur in the intertidal and shallow subtidal zone. Seagrasses occur in the mid-intertidal zone down to shallow subtidal depths. Kelp forests occur in the very low intertidal zone down to subtidal depths. All marshes occur primarily in the upper intertidal zone and form the interface with terrestrial habitats.

The shoreline of Washington State is ringed by vegetated habitats as described above, unvegetated coarse gravel and cobble substrata, as well as developed (e.g., rip rap, pilings) structures. Even developed structures can contain viable vegetation, and the coarsest erosional surfaces (heavy cobble) can at times be vegetated with seaweeds and microalgae. Shoreline vegetation covers on the order of 2,500 miles of the State's coast. In general, marshes, mudflats and sand flats, and seagrass meadows are found in embayments, at the mouths of rivers and streams, and in other similar areas protected from high waves. Seagrass extends along most of the shoreline areas in Puget Sound and the Strait of Juan de Fuca, and is found in great abundance in Grays Harbor, Padilla Bay, and Willapa Bay. Kelp and seaweeds can be found in protected areas as well as coastlines exposed to high wave energy. Kelp and seaweeds require hard substrata such as rock for attachment. Microalgae (e.g., single celled diatoms) occur on most substrata and as epiphytes (i.e., attached to larger plants). They are particularly important components of sand and mudflat habitats, as well as seagrass meadows.

IV. *Diversity*

The region represents one of the richest locations on earth in terms of numbers of species of coastal aquatic plants. The reasons for this diversity are not fully understood but are likely related to the oceanographic conditions (i.e., mixing of water masses), temperate climate, and geology of the shorelines. Over 600 species of seaweed have been recorded from the Washington-British Columbia region. There are two major brown seaweed species that form kelp forests in the region, but several other large brown seaweeds are often grouped with kelp. There are four species of seagrasses, of which eelgrass is one. Tidal and salt marshes are not well documented in terms of numbers of species, but the records indicate that the number of species is at least as high as in the most diverse marshes in the world. Salt marshes are geologically "new" in the region. Uplift and subsidence processes that occur along the coast caused by earthquakes destroy extant marshes every 300-700 years. The marshes then rebuild themselves at a slow rate from this disturbance. Finally, the diatom flora is extremely diverse and has been studied very little. The few studies that have been done suggest that up to 50 species can be found within a very small area (e.g., 1 square centimeter) in some coastal areas.

V. *Ecological Functions*

The major ecological function of coastal vegetated systems is primary production. This means that the plants produce organic matter (i.e., fix carbon) using the energy from the sun and minerals from the water and the air. Coastal aquatic vegetation are among the most productive plant types in the world. Studies in Washington State indicate that the some seaweeds are capable of production rates as high as 900 grams of carbon per square metre per year. Seagrass meadows, kelp forests, tidal marshes are all capable of very

high production rates. Microalgae that dominate tidal flats have productivity rates that are intermediate among coastal plants. Bull kelp, which forms the major component of kelp forests in the State, essentially grows from a microscopic size to up to 20 meters in length in three months during spring and early summer. In order to support this growth, kelp fixes carbon at an extremely high rate. Coastal plants are the dominant source of energy (in the form of organic matter) to the nearshore coastal aquatic food webs. Without this source of energy, nearshore food webs would have to depend upon energy inputs from terrestrial systems and planktonic systems, which may not be adequate to support this community.

Coastal vegetated habitats perform several other ecological functions including sediment trapping, processing of nutrients, flood attenuation, and ground water recharge. Marshes and seagrass meadows trap sediment transported from rivers and streams as well as imported from the ocean. By trapping sediments, the elevation builds gradually in these habitats. Eventually the elevation extends above the highest reaches of the tides to form upland habitat. Nutrients (e.g., nitrate and phosphate) are both utilized and produced in coastal habitats. These processes affect the amount of nutrients in the water, which has a subsequent effect on the plankton-based communities in deeper areas. Wetlands (i.e., tidal fresh water marshes) can serve to store flood waters during periods of extreme rainfall. Human residences can suffer extreme flood damage in areas where tidal marshes have been removed from the system (e.g., placed behind dikes).

VI. *Associated Resources*

The primary ecological functions of coastal habitats for animals resources are: (1) food production; (2) refuge from predation; and, (3) habitat for reproduction and juvenile

rearing. Food is provided directly to animals through herbivory by primary consumers. Herbivory has been proven to be important in seaweed dominated systems, kelp forests, and in seagrasses. In particular, black brandt geese feed almost exclusively on eelgrass. Herbivory has not been studied in other systems to any great degree. Much of what is not eaten directly enters the detrital (dead organic matter) pool. Detritus is broken down into particles that can be readily utilized in the food web. Detritus is the major pathway for organic matter produced by coastal vegetation to reach the aquatic food web in the region. Another major source of organic matter to the food web is dissolved organic matter (DOM). DOM is often exuded from growing plants directly into the water where it is utilized by microorganisms that make the material utilizable by larger animals.

The coastal habitats form an continuum from the terrestrial (upland) system to the deep marine system. In terms of animal resources, this means that migratory animals can benefit from these habitats throughout their migration route. An example is juvenile salmon that are outmigrating to the open ocean. Juvenile salmon utilize, for feeding and refuge, vegetated aquatic habitats along their migration route from upstream spawning areas through estuarine marshes, mudflats and eelgrass meadows. Studies have proven the critical importance of coastal habitats in providing prime feeding and refuge areas for juvenile salmon.

Shorebirds utilize food on mudflats. Perhaps the most dramatic example of massive utilization is found in Grays Harbor. There, shorebirds on the migration to Alaska, feed in the mudflats at low tide and rest in the marshes at higher tides in Bowerman Basin. Some of the highest densities of shorebirds anywhere have been recorded in Bowerman Basin.

Dungeness crab utilize eelgrass and other habitats for much of their life history. Newly settled crabs will hide and feed in eelgrass meadows until they grow large enough to protect themselves from predation. Crabs often mate in eelgrass also.

Eelgrass meadows and seaweed beds are prime spawning areas for herring. Herring lay their eggs directly on the vegetation. Kelp forests as well as some seaweed beds and eelgrass meadows harbor populations of rockfish and have been documented to be critical habitat for juvenile fish of numerous species.

VII. *Vulnerability to Spilled Petroleum*

Research from elsewhere as well as limited research in Washington State indicate that the major vegetation types are all vulnerable to the initial and long-term negative effects of oil spilled in the marine environment. This includes impacts to the primary ecological function, primary production, as well as subsequent effects on other functions in support of animal resources in the State. It has been well documented that animal resources that utilize vegetated habit are susceptible to negative impacts of petroleum in the marine and estuarine environment.

Oil spilled in the marine and estuarine waters in Washington State can reach all coastal vegetated habitats. Since most of the oil fraction floats at the surface of the water, plants in the intertidal zone will be exposed to the oil as the tide moves up and down the shoreline. Floating oil would also contact any subtidal plants such as kelp that have parts of the plant which float at the surface. Because some oil fractions are mixed to deeper layers in the water and heavier fractions can sink, strictly subtidal plants such as some seaweed species also can be directly exposed to spilled oil. Species that occur

very high in the intertidal zone or in the splash zone would be exposed primarily during very high tides and during periods of high waves or winds.

Research elsewhere has shown that vegetated habitats that occur in more protected areas will trap spilled petroleum for longer periods of time than habitats in more exposed areas. Hence, tidal freshwater marshes, saltmarshes, mud and sand flats, some seaweed beds and eelgrass meadows would be vulnerable to trapping oil for extended periods of time. Kelp forests and exposed rocky intertidal seaweed beds would potentially not trap oil for as long a period. Although weathering and microbial processes will actively degrade trapped oil, damage to plants can continue for extended periods of time in areas where the petroleum is trapped in vegetation and sediment.

Research on the effects of spilled oil on marine and estuarine vegetation in Washington State is limited. Petroleum products from the Tenyo Maru oil spill contacted coastal bull kelp forests and other habitats within a week of the accident. Observations in the field indicated that the floating portions of the kelp in the vicinity of visible petroleum products were bleached and apparently dying. Bleaching of kelp indicates loss of pigments such as chlorophyll that are responsible for primary production. Research conducted subsequent to the spill verified that the products spilled could have caused bleached and killed the kelp. Exposure of kelp to the products during these experiments were relatively short term (4 to 24 hours). The research also showed that weathered and unweathered products (diesel, bunker C, crude) could cause bleaching and death of the plants, and that weathered diesel was the most toxic to the plants. Of significance is that the portion of the kelp that was damaged first was in the productive region of the plant. Therefore, exposure of kelp to

these petroleum products prior to reproduction could affect reproductive activity and recruitment of plants in the next year.

VIII. *Summary*

Coastal aquatic vegetated habitats in Washington State cover approximately 2,500 miles of the State's coast. Potential areas of exposure to spilled oil range from the spray zone (+4 m MLLW) to subtidal areas. Direct exposure to spilled oil could occur in vegetated habitats in marine, estuarine, and freshwater habitats. The major vegetated habitats in Washington State are seaweed beds, mudflats, sandflats, seagrass meadows, kelp forests, salt marshes, brackish marshes, and tidal fresh marshes. These habitats serve critical ecological functions including primary productivity, nutrient processing, sediment trapping, and flood attenuation. For animal resources, coastal vegetated habitats provide food, refuge, and habitat for reproduction and juvenile rearing. The importance of vegetated coastal habitat to commercially important resources such as salmon, herring, and Dungeness crab has been well documented in technical literature. All these habitat types are susceptible to damage from spilled petroleum products. Damage to kelp beds has been documented after short-term exposure to petroleum (<24 hours). Habitats that trap petroleum in vegetation and sediment also exhibit negative impacts of the extended exposure to petroleum.

/s/ Ronald M. Thom
RONALD M. THOM

Signed or attested before me, *Beverly J. Jolley*, by *Ronald M. Thorn*.

DATED THIS 31st day May, 1995.

/s/ Beverly J. Jolley
NOTARY PUBLIC, in and for the
State of Washington.

My commission expires: 12/21/97

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR

CAUSE NO. C95-1096

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,

v.

MIKE LOWRY, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MCEACHRAN, Prosecutor of Whatcom County; DAVID NEEDY, Prosecutor of Skagit County; JAMES KRIDER, Prosecutor of Snohomish County; and NORMAN MALENG, Prosecutor of King County,
Defendants,

and

THE WASHINGTON ENVIRONMENTAL COUNCIL; THE NATURAL RESOURCES DEFENSE COUNCIL; and OCEAN ADVOCATES, INC.,
Intervenors.

AFFIDAVIT OF DENNIS PAULSON
(Seabirds—Valuable and Vulnerable Resources of Washington's Marine Waters)

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, DENNIS PAULSON, being first duly sworn, upon oath, deposes and says:

1. I am over 18 years of age and competent to testify herein.

2. *Introduction*. This document presents an overview of the seabirds of Washington. Seabirds are both valuable to humans and vulnerable to human activities. Because they are large and conspicuous, active in the daytime, and readily identified and censused, birds are not only attractive to amateur naturalists and birders but also can be monitored closely to serve as among the clearest indicators of the health of ecosystems.

Direct counts of seabird mortality have long been used as important measures of the biological effects of oil spills, for example, and they are equally important for estimates of natural mortality or that caused by unusual biological conditions such as El Nino. Similarly, direct counts of seabirds at both breeding and nonbreeding sites can be compared over both time and space to determine the health of their populations and thus the health of our marine environment.

3. *Marine Productivity and Washington Seabirds*. Because of the irregular shoreline, temperate climate, juxtaposition of deep and shallow waters, and currents and bottom topography that promote upwellings, Washington's marine waters are extremely productive. Prodigious amounts of phytoplankton, zooplankton, pelagic and benthic invertebrates, and fishes are produced at increasingly higher levels of the food chains characterize our coastal and offshore

environments. At the top of these rich marine food chains are seabirds and marine mammals, which are as abundant in the waters of our state as anywhere in the world. Not only abundance but diversity characterizes marine birds; for example, during the winter months there are about twice as many species of birds on the coast as in the interior of Washington (Paulson 1992).

The 125 species of birds that occur in our marine environments regularly (annually) are listed in the appendix "Seabirds of Washington," which contains a summary of the abundance, seasonality, breeding habitats and sites, foraging habitats and methods, and diets of these species. The appendix in Paulson (1992) allows the placement of Washington marine species in the context of a larger avifauna and larger region. Our state is especially significant for certain species in that our coastal waters support a majority of the Pacific coast populations of those species (noted in the Appendix).

4. *Seabird Abundance*. It must be borne in mind that different species of seabirds are present in Washington's waters in very different numbers, from those such as Sooty Shearwater and Western Sandpiper, in which perhaps millions of birds pass through in migration, to those such as Flesh-footed Shearwater and Sharp-tailed Sandpiper, in which only a few dozen birds may use our state in the course of a year. Obviously the more common species merit our attention, as they are the ones of most importance to marine ecosystems and the ones that have the most to lose to catastrophes such as oil spills.

Because Washington's waters are home to very large numbers of both breeding and wintering birds, and because a substantial portion of the seabirds that migrate up and down the Pacific coast, for example, between Alaska and California, pass through our waters, the numbers of seabirds are

staggering. Few estimates of total numbers of any one seabird species have been made, except for nesting species (Speich and Wahl 1989), but it is probably conservative to estimate the totals as >300,000 birds during the breeding season, >1,000,000 birds during the winter, and >5,000,000 birds during migration. These figures are extrapolated from partial figures given in Wahl et al. (1981), Wahl (1984), and Brueggeman et al. (1992).

5. *Seabird Categories*. Birds that use coastal waters are of two types: (1) *obligate marine species,* in which all populations use salt water; and (2) *facultative marine species,* in which only some populations use salt water, the others occurring in fresh water. Sixty-three (50.4%) of our marine species are obligate; examples include most loons, all shearwaters, Brandt's and Pelagic cormorants, sea ducks, and many shorebirds, and all alcids. Sixty-two species (49.6%) are facultative; examples include Common Loon, herons, Double-crested Cormorants, and many waterfowl.

In both of these groups, there are *resident marine species,* those that are present in our waters throughout the year, and *seasonal marine species,* those in which breeding occurs in freshwater or upland environments and marine environments are used only during the nonbreeding season. There are no marine-breeding bird species that move to freshwater or upland habitats after the breeding season, although individuals of some species do so.

Breeding species are of special significance, as they must have adequate breeding habitats and nest sites as well as adequate foraging conditions and food. The 20 species (16% of the total) that breed on the coast of Washington have entries under breeding habitat and breeding sites in the Appendix.

6. *Seasonal Patterns*. Seasonality is the rule in natural systems. Few of the marine birds of Washington are equally common in every month. Even those that are resident-present all year–vary in numbers seasonally because of the influx of additional birds from the south in summer, from the north in winter, or passing in either direction during the spring and fall migration periods. Fifteen species (12%), including our familiar Great Blue Heron, Bald Eagle, and Glaucous-winged Gull, are present in numbers throughout the year.

7. *Summer Visitors*. Fifteen species (12%) are present primarily in summer. Relatively few seabird species move north into Washington to breed, as most of the breeding seabirds are resident, but conspicuous exceptions to this include the Osprey, Snowy Plover, and Caspian Tern, all of which winter to the south. Some species that are pelagic in the nonbreeding season move inshore to coastal islands to nest while continuing to feed at sea, for example, Fork-tailed Storm-Petrel, Cassin's Auklet, and Tufted Puffin.

The richness of the region is indicated by the number of seabirds, both species and individuals, that breed elsewhere but visit Washington waters during the summer. Some species that breed on the coasts of northern Mexico and California move north after their breeding season to summer in the more productive waters of the Northeast Pacific, for example, Brown Pelican, Heermann's Gull, and Elegant Tern. These species are present in even larger numbers when El Nino conditions diminish the productivity of more southerly waters. Finally, many southern-hemisphere seabirds move into our region in summer, their nonbreeding season. These include Pink-footed, Flesh-footed, Buller's, Sooty, and Short-tailed shearwaters, and South Polar Skua. That individuals of some of these species fly over 6,000 miles to reach our waters is testimony to their productivity.

8. *Winter Visitors*. Sixty species (48%) are present primarily during the winter months. Depending on the species, migrants may arrive as early as July (numerous shorebirds) or as late as early November (some divinglucks); most depart in April and May. This huge influx ofwinter seabirds include species that breed in Alaska's marinevaters, Canadian and Alaskan Arctic tundra environmens, and freshwater and grassland habitats throughout the intrior of northwestern North American. The nesting requirements of these freshwater species precludes them from nestingon our coast, but our rich waters support their populations duing the nonbreeding season.

Wintering water birds that come from freshwær and upland habitats farther north and/or east include 3 spcies of loons, 5 grebes, 25 waterfowl, the American Cot, 17 shorebirds, and 8 gulls. Among them are our most cmmon winter birds.

Relatively few seabirds move into the area fromnarine waters to the north, but they include large numers of Northern Fulmars, Black-legged Kittiwakes, Cmmon Murres, and Ancient Murrelets. Surprisingly, equly large numbers of birds move in from the south, includig Brandt's and Pelagic cormorants and additional Commo Murres. The magnitude of migration into the area fro both north and south (with tens of thousands of murrs coming from both directions to winter in the Strait oJuan de Fuca) clearly indicates the tremendous value ofour waters to seabirds.

9. *Migrants*. Many wa:r birds use Washington waters in spring, fall, or both, a stopover habitat during short or long migratory flights. hirty-five species (28 %) are present primarily during sprig and/or fall, but many species present in other seasons a:o exhibit substantial migratory movements along our coas For example, California Gulls both breed and

winter in Washington, perhaps a few thousand of the former and hundreds of the latter; however, their coastal migrations are in the tens of thousands.

The magnitude of seabird migrations must be seen to be believed. At times, especially during April and May and again from July through October, migration can be observed directly and migrants can be censused accurately, as single birds and flocks of dozens to hundreds move past observers stationed on projecting points and jetties on the outer coast. Movements in excess of 100,000 birds/day have been recorded.

Shorebird migration is similarly spectacular. Grays Harbor and Willapa Bay provide food for hundreds of thousands of individuals of three species of sandpipers and thousands of individuals of an additional 18 species of shorebirds each spring, a spectacle that has generated sufficient public interest to warrant a Grays Harbor Shorebird Festival each year.

10. *Seabird Diets and Breeding Success*. Three major diet categories support Washington's seabird populations: plants, invertebrates, and fishes. Only a few species of waterfowl are obligate plant feeders, but they include locally abundant species such as Tundra Swan, Snow Goose, Brant, and American Wigeon. Invertebrates form the primary food for many species of waterfowl and most shorebirds. Fishes predominate in the diet of diving birds such as loons, grebes, cormorants, and alcids, and birds that fish from the air such as gulls and terns. Some species combine two of these three groups in their diets.

Clearly, a persistent base of food resources is essential to maintaining populations of marine bird species. A collapse in numbers of any organism at any level of the food web

represents a potential threat to the concentrations that characterize seabirds at nesting colonies and favored feeding areas. They may withstand local resource collapse but, especially when tied to breeding areas, may not be able to travel sufficiently far to find food; complete breeding failure over fairly large areas may ensue. Fortunately, seabirds are long-lived and are thus not severely affected by single breeding failures, but multiple breeding failures, as from long-term perturbation by human activities, have more serious consequences.

11. *Oil-Spill Vulnerability*. Obviously, the birds most vulnerable to oil spills are the obligatory marine species; a spill at any season is likely to affect them and, depending on its extent, likely to have substantial population effects. For faculative marine species, only some populations would be affected, their risk in direct proportion to the proportion of their populations on salt water. Finally, seasonal marine species would be affected only during appropriate seasons, although oil-spill effects on feeding substrates or food resources could easily persist until the arrival of these species in the appropriate season.

Seabirds are also differentially vulnerable to oil spills by way of their foraging habits. Those that remain on the water, feeding either on the surface (many waterfowl) or by dividing beneath it (loons, grebes, cormorants, diving ducks), are more vulnerable than those that remain out of the water most of the time, feeding from the water surface in flight (gulls) or on the shore (shorebirds). It is noteworthy that diving birds such as loons, grebes, and alcids have always suffered the most substantial mortality from spills.

Manuwal et a.l. (1979) devised a Bird Oil Index that takes into account differential vulnerability to oil spills. Species that possess any of the following characteristics are

considered especially vulnerable: small populations, low reproductive rate, restricted feeding distribution, highly concentrated nesting areas, narrow winter distribution aquatic roost sites, occurrence in flocks, and diving rather than flying from danger. Species considered especially vulnerable by these criteria are so indicated in the Appendix.

12. *Background Material.*

a) Marine Bird Habitats. Marine habitats can be viewed as a series of zones paralleling the shoreline. Habitats that are treated as discrete by seabirds include the following: open water surface, open water subsurface, subtidal, intertidal, and supratidal. These zones, together with physical characteristics of the bottom and the shore, define the habitats that seabirds use. Open water can be divided into protected and unprotected and with or without strong tidal currents; each type has its own seabird species. Naturalists know that if they visit an exposed rocky headland, they will find Harlequin Ducks and Black Turnstones; similarly, in a salt marsh there will be at Least Sindpipers and Green-winged Teals, in a sand-bottomed bay Western Grebes and White-winged Scoters. Some species, especially predators such as Bald Eagles and large gulls, roam across most habitat types.

b) Unprotected vs. Protected Waters. The outer coast of Washington faces the full force of Pacific winter storms, which affect not only the shoreline but, at their more extreme, well into both subtidal and supratidal realms. There is a substantial shift in seabird abundance from offshore and outer-coastal waters during summer to protected waters during winter. This may be a response to different levels of seasonal productivity or, simply, to the need for protected waters during the season of increased storms.

c) **Currents.** Tidal currents are strongest at the mouths of harbors and anywhere incoming or outgoing tidal waters are constricted by land. These same currents bring nutrients to the surface, increasing productivity and supporting concentrations of prey. San Juan Channel and Admiralty Inlet are such places, where thousands of birds gather in season to feed on the fishes that swarm there. Many of the birds float downcurrent, then fly back upcurrent and repeat the foraging run. Red-necked and Horned grebes fly readily and are part of this spectacle, while Western Grebes, poorer fliers, spend their time in quiet bays with little current.

d) **Bottom Types.** Bottom type is significant in determining the diversity, abundance, and species representation of the invertebrates that are preyed upon by fishes-seabird food-and the birds themselves. Bottom types, both subtidal and intertidal, vary from solid rock to cobble to sand to mud, and in each type, there is a different suite of prey species. For example, rock bottoms support attached mussels, primary food for Suf and Black scoters, while sand bottoms support burrowing clams, primary food for White-winged Scoters.

e) **Shorelines.** As with the bottom the shoreline may be composed of rock, cobble, sand, or mud, or mixtures of these elements; each type has its own shorebird species. Depending on the intertidal topography, low tides may expose narrow rock ledges or thousands of acres of rich mudflats. In addition, the influence of freshwater and terrestrial habitats is felt everywhere the land meets the sea. Terrestrial environments are obviously of great importance to seabirds as nest sites.

f) **Summary.** The marine waters of Washington are richly productive of life, the most conspicuous sign of which are its abundant and diverse seabirds. The 125 species of

birds that occur in these waters, totaling hundreds of thousands to millions of individuals, are spread throughout a great diversity of marine habitats. Many species breed on our coast, and many waters provide especially significant breeding or wintering grounds. All of these birds, particularly those that dive beneath the surface to forage and those that nest colonially or otherwise occur in large concentrations, are highly vulnerable to oil spills.

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/s/ Dennis Paulson
DENNIS PAULSON

Signed or attested before me, *Beverly J. Jolley*, by *Dennis Paulson*.

DATED this 30th day of May, 1996.

/s/ Beverly J. Jolley
NOTARY PUBLIC, in and for the
State of Washington.
My commission expires: 12/21/97

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR

CAUSE NO. C95-1096

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,

v.

MIKE LOWRY, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MCEACHRAN, Prosecutor of Whatcom County; DAVID NEEDY, Prosecutor of Skagit County; JAMES KRIDER, Prosecutor of Snohomish County; and NORMAN MALENG, Prosecutor of King County,
Defendants,

and

THE WASHINGTON ENVIRONMENTAL COUNCIL; THE NATURAL RESOURCES DEFENSE COUNCIL; and OCEAN ADVOCATES, INC.,
Intervenors.

AFFIDAVIT OF MORRIS W. BARKER

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, Morris W. Barker, being first duly sworn on oath, depose and state as follows:

1. My educational background includes Bachelor and Master of Science degrees from Oregon State University and a Doctorate of Philosophy from the University of Washington, all of which are in the field of fisheries science.

2. I am by training a fishery scientist and biologist and have been employed by the Washington Department of Fish and Wildlife since 1978. Presently, I am the Division Manager for Marine Resources and have worked in this area for close to three years. I am responsible for management of all marine shellfish and non-anadromous finfish in state waters, both Puget Sound and offshore. These duties also include a participatory role in multi-jurisdictional management within the 200-mile exclusive economic zone of the United States. This position requires familiarity with the population status and dynamics of the stocks, the fisneries and communities that are dependent on those stocks as well as an overview of the stock ecosystem role and their interrelationship in the context of allowable harvest and concomitant effects. Prior to this management position, I worked as a fisheries biologist in salmon management. I have managed all five Pacific salmon species of the northwest salmon stocks, both from coastal and Puget Sound natal streams. These duties involved development and understanding of the freshwater and marine life history –including the migratory patterns in Puget Sound and the ocean-harvest management, and negotiations with foreign and domestic governments.

3. *Productivity and Diversity of Puget Sound Marine Resources.* The productivity and diversity of Puget Sound marine waters is quite extensive and supports a very complex and integrated ecosystem. The interdependencies of the

marine and terrestrial life that are obligatory to this system are both robust and fragile: robust in that there are vital and healthy populations, and fragile from the perspective of the linkages between species and/or their habitat. Examples in this latter category include the relationship of bald eagles and marine mammals with the fish upon which they prey; the dependency of forage fish such as herring or surf smelt on critical spawning habitat in the intertidal zone and on marine vegetation; the protective habitat and food provided by marine vegetation to many invertebrate species, juvenile rockfish and other small fish species; and the dependency of many protected sea bird species (including the endangered marbled murrelet) on the health and productivity of forage fish populations such as herring and sand lance. Damage or destruction of any of these links has consequences that extend significantly beyond the immediate visible effects and ripple through the food chain with negative impacts to the whole ecosystem.

There are many hundreds of species of animals and plants that contribute to this functioning resource base and for the most part their individual species roles are esoteric or unknown. However, for those many species of recreational, commercial and cultural interest in Puget Sound the relationships between species and their effect on society are better understood. These organisms include five species of salmon (chinook, coho, pink, chum and sockeye) and three species of anadromous salmonids (steelhead, dolly varden and cutthroat); over 30 species of rockfish, dogfish shark, many species of flatfish (English sole, starry flounder, rock sole, sand dabs, etc) and other marine groundfish including pollock, Pacific cod and whiting; two species of crab; two species of urchins; abalone; at lest four species of shrimp; and over a dozen species of bivalves (oysters, clams and scallops)

including the geoduck which supports valuable Tribal and commercial fisheries (Attachment: 1996 Geoduck Atlas).

4. *Salmon Resource.* For each of the five salmon species there are three critical habitat components; freshwater, estuarine and marine. All salmon spawn in freshwater and migrate to the sea anywhere from a week to more than a year after hatching, depending on the species. All of the species pass through estuarine areas on the way to the sea. The estuary is a very productive environment and supplies a critical early rearing and feeding ground for many of these species. This is also a period of great physiological stress as the young salmon (smolt) transitions from a freshwater to a saltwater environment. This transition is marked by complex internal changes to adapt to the new medium. Many studies have demonstrated that extra stress at this time can disrupt the smoltification process and create significant mortalities among the outbound juveniles. Pollution is one of the major factors that disrupt the smoltification process. Between March and June millions of juvenile salmon leave the rivers where they were born and migrate along the shorelines of Puget Sound feeding on pelagic invertebrate and vertebrate fauna (adults such as copepods; and larval forms of such species as crab and fish) as they make their way to the ocean feeding grounds. After 1-7 years, again depending on the species , they return as adults to the Puget Sound on their way back to their natal stream. Some stocks of chinook and coho salmon, and pink salmon to a lesser extent, find the waters of Puget Sound to be productive enough to support their adult rearing needs. Consequently they reside in Puget Sound year around and provide for a constant source of recreational fishing opportunity. From April through December, hundreds of thousands of salmon move through the waters of Puget Sound where sport, commercial and tribal fishers harvest them.

5. *Marine Fish and Baitfish.* Finfish resources utilize habitats that include estuarine and nearshore environments. Many species of rockfish, flatfish, lingcod and forage fish use these shallower water environments in their early life history as nursery grounds after they settle out of their planktonic larval stage of development. Both the shallow water environment, including intertidal, and the surface waters where many of the larval forms can be found are very susceptible to lethal impacts from pollution such as petroleum and its refined products. Not only do these species become impacted but their prey items are also impacted (includes not only pelagic fauna but also phytoplankton). Although many of the finfish will move to deeper water to live their adult life there are many species who spend their adult life in shallow water or are obligatory temporary inhabitants because they spawn in the shallow and/or intertidal areas. Such species (including surf smelt, rock sole, and herring) are important recreational and commercial species as well as important prey items to the other animals in the ecosystem. Direct oiling can smother eggs in and on the substrate, chemically poison the progeny, and cause adult spawner avoidance and/or mortalities from the chemical contaminants.

6. *Shellfish.* All shellfish in Puget Sound are at risk from pollution, particularly petroleum and its refined products. Shellfish (invertebrates) in their many forms spend all or a part of their life cycle as plankton in the water column. The presence of polluting materials in and on the water create a large number of mortalities among these fragile organisms and their prey items (see Para. 5). Those species who only spend a portion of their life cycle in the water column could also be subjected to environmental impacts as juveniles and adults. Many important commercial and recreational species fall into this category (oysters, clams, mussels, urchins and abalone) which all could be affected by

direct oiling in the intertidal areas as well as other levels of exposure through sinking sediments and chemical contaminants.

7. *Social-Economic Fisheries Issues*. In terms of socio-economic issues, this system in turn supports many year around and seasonal commercial and recreational fisheries (see attachments re: recreational and commercial catch statistics: 1993 Fisheries Statistical Report and Washington State Sport Catch Report For Foodfish 1993) as well as the culture and traditional lifestyle of the Washington Treaty Indian Tribes through their fishing activities. For example, in 1993, Washington *commercial* fish and shellfish harvesters delivered over 189 million pounds of seafood worth $159 million at the ex-vessel level and $354 million dollars at the wholesale level, including the harvest of 6,525,000 salmon with a retail value of $74,128,000. Also, in 1993, 1,010,030 sport anglers caught an estimated 475,632 salmon in marine waters. And 1,252,177 pounds of clams and 78,753 pounds of oysters were harvested from Puget Sound areas east of Dungeness spit.

The value of a healthy, stable and diverse ecosystem provides extensive year around economic return to the state and its communities as well as strong cultural linkages to the many diverse ethnic groups. These economic values come from direct sales, secondary enhanced products, infrastructure support (marine equipment, fishing gear, fuel, marinas, boat yards) jobs, taxes, etc. Many indirect values are also evident through family recreational experiences, maintenance of traditional fishing community and individual lifestyles. The clean waters of Puget Sound, salmon fishing and other seafood resources have long been synonymous with the Pacific Northwest and this has provided the incentive for

many people to move both businesses and families to this area.

/s/ Morris W. Barker
MORRIS W. BARKER

Signed or attested before me, *Beverly J. Jolley*, by *Morris W. Barker*.

DATED this 31st day of May, 1996.

/s/ Beverly J. Jolley
NOTARY PUBLIC, in and for the
State of Washington.
My commission expires: 12/21/97

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR

CAUSE NO. C95-1096

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,

v.

MIKE LOWRY, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MCEACHRAN, Prosecutor of Whatcom County; DAVID NEEDY, Prosecutor of Skagit County; JAMES KRIDER, Prosecutor of Snohomish County; and NORMAN MALENG, Prosecutor of King County,
Defendants,

and

THE WASHINGTON ENVIRONMENTAL COUNCIL; THE NATURAL RESOURCES DEFENSE COUNCIL; and OCEAN ADVOCATES, INC.,
Intervenors.

AFFIDAVIT OF SUSAN ZEMEK

STATE OF WASHINGTON)
) ss.
County of Thurston)

I, Susan Zemek, being first duly sworn on oath, depose and say:

1. That I am a citizen of the United States, over the age of 18 years, and competent to be a witnesses in the above-entitled cause.

2. I am the Public Affairs Administrator for the Washington State Parks and Recreation Commission.

3. My responsibilities as Public Affairs Administrator include providing statistics on the extent and nature of public usage of Parks and Recreation Commission facilities.

4. Attached hereto as Exhibit 1 is a true and accurate list of Parks and Recreation Commission sites located on or adjacent to Puget Sound, and an indication of the estimated annual visitation for each such site, as well as a list of recreational activities which are customarily undertaken at each site.

5. These statistics indicate that the total annual estimated visitation for Parks and Recreation Commission sites on or adjacent to Puget Sound is 55,917,511.

/s/ Susan Zemek

SUBSCRIBED and SWORN to before me this 31 day of May, 1996, by Susan Zemek.

/s/ Judy K. Larson
JUDY K. LARSON

NOTARY PUBLIC in and for the State of Washington.
My appointment expires: 12-25-96

EXHIBIT 1

WASHINGTON STATE PARKS

Here is a list of Washington State Parks, followed by their 1995 attendance, and a list of activities commonly done at the park. Total park visitation for 1995 is 55,917,511.

Anderson Lake: 220,558
Fishing and hiking.

Bay View: 1,424,298
Camping, picnicking, swimming and sailboarding.

Beacon Rock: 1,678,729
Picnicking, camping, hiking, playground activities, fishing, boating, rock climbing, horseback riding, historical site, and mountain biking.

Belfair: 2,573,066
Camping, picnicking, beachcombing, crabbing, and kite flying.

Birch Bay: 6,442,672
Camping, scuba diving, picnicking, hiking, clamming, bird watching, water skiing, crabbing, beachcombing, kite flying, windsurfing, and photography.

Blake Island: 1,060,555
Picnicking, camping by boat, boating, water skiing, fishing, hiking, beachcombing, scuba diving, bird watching, and marine life study.

Blind Island: 23,646
Camping, picnicking, scuba diving, and bird watching.

Camano Island: 1,968,035
Camping, picnicking, hiking, boating, clamming, nature study, scuba diving, rock collecting, and bird viewing.

Clark Island: 33,879
Camping, picnicking, fishing, hiking, scuba diving, and clam digging.

Cone Island: Undeveloped.

Crow Butte: 946,572
Boating, camping, fishing, hiking, picnicking, sightseeing, swimming, water skiing, windsurfing, and bird watching.

Cutts Island: Undeveloped.

Dalles Mountain Ranch: Undeveloped.
Hiking.

Danger Island: Undeveloped.

Dash Point: 2,021,920
Camping, picnicking, hiking, fishing, beachcombing, and marine life study.

Deception Pass: 19,658,351
Camping, boating, hiking, fishing, swimming, beachcombing, historical site, and Environmental Learning Center.

Doe Island: 16,632
Camping, picnicking, fishing, scuba diving, and hiking.

Dosewallips: 985,973
Camping, picnicking, hiking, fishing, oyster harvesting, clamming, shrimping, and wildlife viewing.

Doug's Beach: 298,558
Windsurfing and fishing.

Dungeness Spit:
Hiking.

Eagle Island: Undeveloped.
Clamming and fishing.

Ebey's Landing: 210,847
Trail to historic cemetery, beachcombing, hiking, and surf fishing.

Everett Jetty: Undeveloped.

Fay Bainbridge: 1,058,016
Camping, picnicking, beachcombing, fishing, clamming, crabbing, scuba diving, and boating.

Fort Canby: 3,131,338
Lava site, artillery site, camping, picnicking, beachcombing, fishing, heritage site, hiking, clamming, and boating.

Fort Casey: 2,814,084
Camping, picnicking, hiking, fishing, driftwood collecting, interpretive center, boating, and historical site.

Fort Columbia: 761,189
Natural historic site, historical fort, interpretive center, picnicking, and hiking.

Fort Ebey: 1,673,992
Camping, hiking, picnicking, interpretation, and beachcombing.

Fort Flagler: 1,784,488
Camping, picnicking, boating, beachcombing, hiking, scuba diving, fishing, clamming, crabbing, and historical site.

Fort Ward: 319,582
Picnicking, beachcombing, hiking, clamming, crabbing, boating, fishing, and scuba diving.

Fort Worden: 5,686,312
Camping, conferences, fishing, scuba diving, youth hostel, hiking, cultural arts, picnicking, boating, biking, historical site, and museum.

Freeman Island: Undeveloped.

Hoodsport Trail: 81,061
Hiking and picnicking.

Hope Island North: Undeveloped.
Picnicking, beachcombing, clamming, and fishing.

Hope Island South: Undeveloped.
Picnicking, beachcombing, clamming, and fishing.

Horsethief Lake: 540,352
Indian pictographs, boating, rock climbing, windsurfing, picnicking, and camping.

Iceberg Island: Undeveloped.

Illahee: 1,5847,742
Camping, boating, picnicking, water skiing, oyster harvesting, clamming, and hiking.

James Island: 105,907
Camping, picnicking, hiking, fishing, and scuba diving.

Jarrell Cove: 240,640
Picnicking, hiking, camping, clamming, fishing, and boating.

Joemma Beach:
Beachcombing, camping, boating, clamming, crabbing, fishing, camping, and picnicking.

Jones Island: 188,955
Camping, picnicking, fishing, clamming, and scuba diving.

Joseph Whidbey: 416,655
Picnicking, hiking, beachcombing, and camping.

Keystone Spit:
Beachcombing, picnicking, bird watching, fishing, kite flying, sail boarding, and interpretation.

Kitsap Memorial: 1,238,307
Picnicking, camping, hiking, volleyball, and baseball.

Kopachuck: 618,536
Hiking, camping, boating, picnicking, water skiing, beachcombing, fishing, scuba diving, and bird viewing.

Lake Cushman: 924,912
Picnicking, boating, water skiing, hiking, camping, and fishing.

Larrabee: 2,521,613
Picnicking, boating, fishing, clamming, camping, water skiing, crabbing, hiking, beachcombing, and scuba diving.

Lilliwaup Tidelands:
Beachcombing, clamming, and shellfish digging.

Lime Kiln Point: 582,824
Whale watching, picnicking, and hiking.

Lopez Island Tidelands: Undeveloped.

Manchester: 575,274
Scuba diving, fishing, picnicking, camping, interpretation, and hiking.

Maryhill: 2,425,058
Boating, camping, fishing, hiking, picnicking, swimming, water skiing, and wind surfing.

Matia Island: 47,726
Camping, picnicking, fishing, scuba diving, hiking, and clamming.

McMicken Island: 18,250
Hiking, clamming, and fishing.

Moran: 3,066,055
Hiking, camping, swimming, Environmental Learning Center, boating, fishing, biking, and historical site.

Mukilteo: 5,950,920
Beachcombing, bird watching, kite flying, boating, and historical site.

Mystery Bay: 364,795
Picnicking, boating, clamming, and crabbing.

Old Fort Townsend: 755,410
Camping, picnicking, hiking, fishing, clamming, crabbing, bald eagle viewing, and historical site.

Old Man House: 2,707
Picnicking and clamming.

Olga:
Boating.

Patos Island: 32,151
Camping, picnicking, fishing, hiking, and clamming.

Peace Arch: 1,660,331
Horticultural displays, interpretation, picnicking, gardens, and miscellaneous city sponsored recreational activities.

Penrose Point: 671,806
Picnicking, boating, camping, hiking, beachcombing, and fishing.

Pleasant Harbor:
Boating.

Posey Island: 10,875
Boating.

Potlatch: 1,198,847
Picnicking, camping, fishing, scuba diving, and boating.

Rock Island: Undeveloped.

Rothschild House: 76,149
Restored historical house, interpretation.

Saddlebag Island: 21,224
Camping, picnicking, fishing, hiking, and crabbing.

Saltwater: 2,954,392
Picnicking, camping, scuba diving, hiking, and clamming.

Scenic Beach: 907,093
Picnicking, camping, hiking, boating, fishing, harvesting oysters, and interpretation.

Sequim Bay: 2,126,725
Picnicking, camping, fishing, clamming, scuba diving, beach walking, field and group sports, tennis, boating, beachcombing, hiking, and bird viewing.

Shine Tidelands: 107,516
Beachcombing, hiking, scuba diving, and windsurfing.

Skagit Island: Undeveloped.

Skull Island: Undeveloped.

South Whidbey: 1,089,340
Picnicking, hiking, scuba diving, rock collecting, clamming, bird watching, crabbing, camping, driftwood collecting, fishing, and beachcombing.

Spencer Spit: 1,081,431
Camping, picnicking, beachcombing, bird viewing, fishing, clamming, and interpretation.

Square Lake:
Swimming, hiking, canoeing, and fishing.

Stretch Point: 16,273
Picnicking, beachcombing, boating, clamming and fishing.

Stuart Island: 195,301
Camping, picnicking, hiking, fishing, clamming, and crabbing.

Sucia Island: 528,430
Camping, picnicking, hiking, boating, clamming, and crabbing.

Toandoes Peninsula Tidelands: Undeveloped.

Tolmie: 2,412,137
Picnicking, beach walking, clamming, fishing, and scuba diving.

Triton Cove: 75,969
Picnicking and boating.

Turn Island: 27,353
Camping, picnicking, fishing, clamming, and scuba diving.

Twanoh: 1,843,593
Boating, picnicking, swimming, oyster harvesting, water skiing, fishing, camping, and hiking.

Useless Bay: Undeveloped tidelands.

Victim Island: Undeveloped.

Wenberg: 1,999,528
Camping, picnicking, play area, swimming, boating, water skiing, fishing, hiking, and windsurfing/sailing.

West Hylebos: 173,328
Bird watching and hiking.

Wolfe Property: 89,304
Beachcombing, hiking, camping, scuba diving, windsurfing, clamming, and crabbing.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR

CAUSE NO. C95-1096

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,

v.

MIKE LOWRY, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MCEACHRAN, Prosecutor of Whatcom County; DAVID NEEDY, Prosecutor of Skagit County; JAMES KRIDER, Prosecutor of Snohomish County; and NORMAN MALENG, Prosecutor of King County,
Defendants,

and

THE WASHINGTON ENVIRONMENTAL COUNCIL; THE NATURAL RESOURCES DEFENSE COUNCIL; and OCEAN ADVOCATES, INC.,
Intervenors.

AFFIDAVIT OF RICHARD KOCAN

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, RICHARD KOCAN, being first duly sworn, upon oath, deposes and says:

1. I am over 18 years of age and competent to testify herein. I have attached a copy of my resume.

2. Since 1989 when the Exxon Valdez spilled 11 million gallons of Prudhoe Bay crude oil in Prince William Sound (Alaska), environmental scientists have significantly expanded our knowledge of the effects of petroleum on the biota of a fjord-like marine ecosystems. During the 7 years following the spill, natural resource damage assessment (NRDA) studies have examined every aspect of the Prince William Sound ecosystem. Because Puget Sound is similar to Prince William Sound in many ways, it is possible to predict the effects of an oil spill on the marine resources of Puget Sound using data collected in Prince William Sound since 1989.

3. The effects of spilled petroleum on Puget Sound will be influenced by factors such as:

1. Amount of oil spilled;
2. Where oil is spilled (bay vs open water; high energy beach vs quiet bay);
3. Type of oil (eg. geographic origin; crude or refined);
4. Water exchange (currents and tidal effects);
5. Season (spawning; migration);
6. Weather (wind; rain);
7. Response time and experience of clean-up crews;
8. Coordination of clean-up among various responsible agencies.

4. Puget Sound is a marine fjord consisting of heavily industrialized embayments and open, relatively pristine areas. Overall, water exchange within the Sound is limited, with some areas judged to be more sensitive than others to anthropogenic inputs because of their depth and/or low water exchange. Some of these sensitive areas include but are not limited to:

Hood Canal	Dyes Inlet
Sinclair Inlet	Holmes Harbor
Budd Inlet	Dabob Bay
Sequim Bay	Liberty Bay
Carr Inlet	Port Susan
Quartermaster Harbor	Penn Cove
Case Inlet	Port Orchard

Because these areas are relatively confined and shallow, they would be more adversely affected by an oil spill than would open areas. The sediments in shallow intertidal and subtidal areas would become heavily contaminated and affect survival and reproduction of organisms such as clams, oyster, mussels, crabs and intertidal fishes.

5. Although crude oil is sparingly soluble in seawater (< 10ppb) it partitions into sediments and seasurface microlayer at levels ranging from 1,000 - 10,000 ppm. Since many marine organisms have embryonic and larval states that are benthic (sediment) or neustonic (seasurface) there is a high probability that they will come into contact with toxic concentrations of hydrocarbons if a spill occurred in an area used by these early life stages. Normally only highly visible or economically important organisms, such as fish, shellfish and marine mammals are examined following an oil spill. Of equal importance is the microscopic plankton that constitutes the bottom of the food chain and upon which the entire marine

ecosystem depends. Following the Exxon Valdez oil spill it became evident that these microscopic food items were severely damaged and that the effect rippled through the entire food chain.

6. A number of organisms are common to both Prince William Sound and Puget Sound, so one would expect that if an oil spill occurred in Puget Sound it would produce damage similar to that seen in Prince William Sound. A few examples of animals common to both ecosystems, and the expected effects of oil contamination are discussed here. Seal and sea lion populations in Puget Sound have increased dramatically since the inception of the Marine Mammal Protection Act and are common in many parts of Puget Sound today. Sea otters are successfully reestablishing themselves along the Pacific coast as well as the Straights of Juan de Fuca, and river otters are common throughout Puget Sound and Hood Canal. All of these mammals are susceptible to oiling and frequently suffer serious health problems and mortality when exposed. Bald eagles have extended their range south of the Skagit River and are often seen nesting in areas as close to Seattle as Bainbridge Island and the Kitsap Peninsula. These birds are scavengers and eat oil-contaminated fish and birds in the area of an oil spill, thus suffering the toxic effects of ingested oil. Other birds such as murrelets, auklets and diving ducks frequent Puget Sound either as permanent residents or migrants and are highly susceptible to hypothermia following exposure to oil.

7. The Puget Sound herring population has remained stable for nearly 15 years following the closure of most commercial fishing of this species. For the past several years the populations have been high enough that the Washington Department of Fisheries has permitted a limited roe-on-kelp fishery and bait fishery that supports both Indian and non-

Indian fishermen. Since herring are intertidal and subtidal spawners, their eggs are at high risk of being exposed to spilled oil. Their larvae live in and feed in the top few centimeters of the sea surface for the first three months of life and come into direct contact with oil slicks and the seasurface microlayer. Although fishable salmon populations in Puget Sound have remained relatively stable, wild stocks have suffered dramatic declines over the past decade due primarily to habitat destruction. An oil spill that affects intertidal reaches of salmon spawning streams, areas used by pink and chum salmon, would further damage valuable spawning habitat and increase the rate of decline in wild fish of these species.

The oiling of shellfish beds would result in the loss of both commercial and recreational shellfishing as well as contaminating a major food item for many marine animals. Mussel beds are known to trap oil under them for as long as five years following an oil spill, and this trapping of oil under these beds would not only contaminate the mussels but for many years, potentially impact those species that depend on them as food.

8. The following list includes those resources that were damaged by the Exxon Valdez oil spill and the specific types of damage observed. Similar resources would be expected to suffer similar damage if an oil spill occurred in Puget Sound (see attachments).

Mammals

a) **Harbor seals:** A conservative estimate of 345 seals died in Prince William Sound as a result of exposure to crude oil. Petroleum metabolites in the seal's bile were 7-13 times higher in oiled areas relative to unoiled areas and it is believed that their immune system may have been damaged.

In oiled areas 50-100% of the seals were oiled because they do not avoid oil and pups became oiled shortly after birth. Microscopic examination of dead oiled seals revealed they suffered from brain lesions characterized by swelling and degeneration of the nerve axons which interfered with nerve transmission. This made it difficult for affected individuals to perform normal activities such as swimming, diving, feeding and escaping predators. The blubber contained the highest levels of hydrocarbons, but mammary tissue and milk also contained up to 1,200 ppb. Pup production was lower and mortality higher in oiled areas in 1989 than in 1990 or 1991.

b) **Sea Otters:** Surveys of otters between 1989 and 1991 showed that between 3,500 and 5,000 sea otters died as a result of the spill. This is 20-25% of the total sea otter population of the Gulf of Alaska. In 1992 there was still higher than normal mortality among adult otters and poor survival of juveniles, indicating that the otters had not yet recovered from spill damage. The most common terminal clinical syndrome seen in oiled otters was shock characterized by hypothermia, lethargy and hemorrhagic diarrhea. Internally, interstitial pulmonary emphysema was the most prevalent lesion seen in oil-contaminated otters.

Birds

c) **Bald eagles:** Estimates range from 200-300 to > 900 dead bald eagles following the Exxon Valdez oil spill. The greatest damage occurred immediately after the spill, was short term and resulted from direct contact with oil or oil-contaminated prey items.

d) **Common murres:** Both mortality and sublethal effects were observed in Common murres. Between 175,000 and 300,000 murres were killed in 1989 and reproduction among the survivors was still below normal in 1992. Annual

counts of murres from 1989-1991 at colonies within the oil trajectory were 40-60% lower than pre-spill counts while at colonies just outside the trajectory there was no observed population decline.

e) **Pigeon guillemots:** Between 1,500 and 3,000 guillemots died (25-36%) in 1989 following the oil spill. By 1992 the population was approximately one half its pre-spill size. The most heavily oiled areas suffered the largest population declines in 1989; about twice as great in oiled areas as in unoiled areas. Unhatched eggs were found coated with oil as late as 1990, indicating that the birds were still being exposed one year after the spill. Guillemots were not recovering by 1992.

Fish

f) **Pacific herring:** In 1989 Prince William Sound herring suffered significant egg mortality, increased deformed larvae, and reduced hatching weight in oiled spawning areas but not in unoiled areas. Larvae from oiled spawning areas also exhibited a significant increase in genetic damage in the form of chromosome breakage and abnormal cell division as well as lower hatching weights. These findings were confirmed in laboratory experiments where herring embryos were exposed to known amounts of Prudhoe Bay crude oil. Females that had been exposed to oil as juveniles produced significantly fewer normal and live larvae when they returned to spawn four years later.

Microscopic examination of herring tissues in 1989 revealed that fish captured from several oiled areas had severe hepatic necrosis (liver cell death), while those collected from unoiled sites were normal. Experimental exposure of herring to environmentally realistic levels of oil resulted in identical live damage in the exposed fish.

In 1993 and 1994 over 90% of the Prince William Sound spawning herring biomass disappeared as a result of VHS, a viral disease that had not been known to occur in herring prior to the oil spill. Mortality in herring associated with VHS virus has not occurred in free ranging fish outside Prince William Sound, except where petroleum has been spilled. Studies in Puget Sound have shown that juvenile herring less than 6-months-old are already infected with this potentially lethal virus and that if wild herring are stressed, epizootics of VHS occur.

g) **Salmon:** Increased egg mortality and physically deformed fry were observed in pink salmon in oiled streams between 1989 and 1992. It is suspected that the poor pink salmon returns in 1992 and 1993 may be the result of earlier increased egg mortality in oil streams. Egg and fry mortality was found from the mouth of the spawning streams up to the highest level reached by oil in 1989. Significantly less mortality was observed in streams that escaped oiling in 1989.

Shellfish

h) Caged mussels deployed at various sites in and around Prince William Sound were found to be contaminated with whole Exxon Valdez oil, even when deployed at 25 meters. The highest levels of mussel contamination occurred closest to the oil trajectory and at 1 meter depths near oiled shoreline. These reached levels of 5.7 μg/g at 1 m and 3.17 μg/g at 5 m. Mussels deployed outside Prince William Sound in 1989 and those deployed in the Sound in 1990 and 1991 had hydrocarbon concentrations below detection limits. These contaminated mussels had whole Exxon Valdez Oil in their tissues, indicating that particulate oil can sink to significant depths following a spill.

Coastal Habitat

i) **Intertidal habitat:** Population declines and sublethal effects were observed in numerous intertidal plants and animals. Lower and mid intertidal areas appear to be recovering faster than the upper intertidal zones, which had not fully recovered three years after the oil spill. Oil persists in and under mussel beds five years after the oil spill.

j) **Subtidal habitat:** Subtidal plants and animals suffered both population declines and sublethal effects. Eelgrass and some species of macroalgae were recovering three years after the spill.

Economic Resources

k) **Commercial fishing:** Emergency commercial fishing closures were instituted in 1989 throughout the spill area and affected salmon, herring, crab, shrimp, rockfish, and sablefish. Herring were opened from 1990 through 1993 when there was a 90,000 ton decline in biomass which once again triggered a fishing closure that continues into 1996.

l) **Tourism:** Forty-three percent of the commercial tourism business in the Prince William Sound area reported a decline in business due to the oil spill. This was reduced to 12 percent by 1990.

/s/ Richard M. Kocan
RICHARD KOCAN

Signed or attested before me, *Richard Kocan,* by _____.

DATED this 3rd day of June, 1996.

/s/ Linda M. Marsh
NOTARY PUBLIC, in and for the
State of Washington.
My commission expires: 10/28/97

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR

NO. C95-1096c

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,

vs.

MIKE LOWRY, Governor of the State of Washington, et al.,
Defendants.

AFFIDAVIT OF RONALD F. TEISSERE

STATE OF WASHINGTON)
) ss.
County of Thurston)

I, RONALD F. TEISSERE, being first duly sworn upon oath, deposes and says:

1. I am an Assistant Division Manager for the Washington Department of Natural Resources, Division of Aquatic Resources. I have been in this position since 1989. My duties include supervision of the state's geoduck clam sales program, the maintenance of the ownership and encumbrance records of state-owned aquatic lands, the land use planning functions of the Division, and the collection of data on the near-shore physical and biological habitats of Puget Sound.

2. I have reviewed the July 1, 1995, table of lands managed by the Department of Natural Resources, especially

with regard to state-owned aquatic lands, that is attached to my affidavit as Exhibit 1. The Department of Natural Resources manages these state-owned aquatic lands as a steward under the Public Trust Doctrine. This responsibility came to the state as a result of its acquisition of these sovereign lands from the United States at statehood. RCW 79.90.455 articulates the implementation of this responsibility with regard to the management and development of state-owned aquatic lands by the Department.

3. As shown on Exhibit 1, the revenue from leases, easements, sales of valuable materials, and other uses of state-owned aquatic lands is distributed to three different accounts based on either the nature of the activity as in the case of dredge disposal, or the type of lands involved. The three accounts are the Aquatic Lands Dredge Disposal Account, the Aquatic Lands Enhancement Account, and the Resource Management Cost Account. The direct revenue generated from state-owned aquatic lands for Fiscal Year 1995 was $9,983,858.

4. Most leases of state-owned aquatic land are for uses such as boat moorage and marine terminals that, by their nature, require a waterfront location. The Legislature has directed that the rentals for these uses be set below fair market value to encourage economic development around Puget Sound and other waters of the state. This strategy has been demonstrably successful, as shown by the economic value associated with the development of the waterfront areas. Estimates of this value are many times the direct revenues.

5. Another aspect of the development of the Puget Sound waterfront has been the increase in the value of real property adjacent to the waterfront. In some areas of the Sound, assessed valuations of residential waterfront property exceeds two million dollars per acre. The property taxes

generated by these high property values flows directly to local governments. The waterfront property value, after applying a legislatively-established discount, is the principle determinant of rentals for leases of state-owned aquatic lands.

6. Exhibit 1 does not address the major economic values of state-owned aquatic lands. These other values include the dollar values associated with the biological and physical habitats that support several commercial fisheries, a large recreational fin fish and shellfish component, and the commercial value of the shellfish harvesting done by Native Americans under various treaties. Puget Sound has become a destination resort location for water-related activities because of the availability and health of these resources. The valuation of these types of resources for recreational use has generally been done using contingent valuation methods.

7. In summary, no attempt has been made to comprehensively value the state-owned aquatic lands within Puget Sound. The annual direct revenue represents a fraction of the overall economic contribution to the state from a fraction of the total area of the Sound. Puget Sound and the Straits of Juan de Fuca contain approximately one million acres. Less than 50,000 acres of this area is under lease from the state of Washington.

/s/ Ronald F. Teissere

SIGNED AND SWORN To before me this 31st day of May, 1996, by Ronald F. Teissere.

/s/ A.W. Grimes
Notary Public in and for the
State of Washington,
Name: Audrey Wagner-Grimes
Commission Expires: 9-15-98

The United States District Court
Western District of Washington State

Honorable John C. Coughnour

Case No. C95-1096C

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,
v.
MIKE LOWRY, Governor of the State of Washington; et al.,
Defendants.

THE WASHINGTON ENVIRONMENTAL COUNCIL;
THE NATURAL RESOURCES DEFENSE COUNCIL, Inc.;
and OCEAN ADVOCATES, Inc.,
Intervenors.

AFFIDAVIT OF ARTHUR McKENZIE IN SUPPORT OF INTERVENORS' MOTION FOR SUMMARY JUDGMENT

STATE OF WASHINGTON)
) ss:
COUNTY OF NEW YORK)

Arthur McKenzie, being sworn, states:

1. I am the Director of the Tanker Advisory Center, Inc., and submit this affidavit in support of the Motion for Summary Judgment of Intervenors Washington Environmental Council, Natural Resources Defense Council and Ocean Advocates.

Qualifications

2. I have had over 60 years experience in the tanker industry. I spent 11 years at sea serving on Exxon Corporation tankers, first as a seaman and later attaining the rank of Chief Mate and obtaining my Master's license.

3. Subsequent to serving on tankers at sea, I worked for Exxon for 29 years ashore, directly and indirectly involved in the operation of oil tankers. During my last eight years with Exxon, I served as Senior Marine Advisor. While at Exxon and thereafter for the last 25 years, I have taught a 30-hour course entitled "Petroleum Tankship Operations" which over 5,000 people have completed.

4. I also founded the Tanker Advisory Center, Inc. in order to provide information on tankers and tanker operations to persons wishing to charter a tanker, understand their operational capabilities, or analyze oil transportation alternatives. Each year for the last 14 years, the Center has published an annual *Guide for the Selection of Tankers*, a reference book which reports on and evaluates over 3,300 tankers.

5. I also serve or have served on numerous tanker operation related boards including:

- The Council of Trustees of the United States Seaman's Service;
- The United States Coast Guard's Advisory Committee on Rules of the Road;
- The National Materials Advisory Board of the National Research Council, which Board prepared the report *Materials Aspects of Inert Gas Systems for Cargo Tank Atmosphere Control;* and

- The Committee on Control and Recovery of Hydrocarbon Vapors from Ships and Barges of the Marine Board of the National Research Council, which Committee prepared the report *Controlling Hydrocarbon Emissions from Tank Vessel Loading*.

6. As a result of these activities and this experience, I am extremely familiar with tanker operations and navigational needs. With reference to this litigation, I have examined:

- The State of Washington's Best Available Protection (BAP) Rules, codified at WAC 317-21, "Tank Vessel Oil Spill Prevention Plans;"
- The Model Oil Spill Prevention Plan for Tankers, prepared by the Washington State Office of Marine Safety, dated April 1995;
- The complaint of plaintiff Intertanko; and
- Other materials relating to federal and international requirements governing tanker operations.

The Washington State Best Available Protection Rules

7. I have examined the Washington State Best Available Protection (BAP) Rules. On the basis of my experience and training, as described in more detail below, I believe that: (1) these BAP rules do not conflict with any existing federal or international standards; (2) the BAP Rules will be effective in preventing oil spills and protecting the Puget Sound environment; and (3) the BAP Rules do not impose an unreasonable burden on tanker operations or tanker owners.

The Rules Do Not Conflict with Existing Law.

8. The BAP Rules impose additional – not different or inconsistent – requirements on tankers when operating in Washington State waters. While the Rules do in some ways impose requirements on tanker operators that they must follow when operating in Washington State waters that they need not follow elsewhere, a tanker following these additional requirements will not be in violation of any existing federal or international standards. The BAP Rules are thus not inconsistent with existing law.

9. Several of the Rules simply define general phrases used in other regulations. In my experience, a general qualification such as "appropriate" needs site-specific definition and the BAP Rules provide an important measure of protection in so doing. For example, while federal and international standards require security rounds as "appropriate," the BAP Rules define this as every 2 hours (or every 4 hours if the ship has certain equipment). WAC 317-21-200(4)(d). Similarly, federal law requires anchor watches at "sufficiently frequent intervals;" the BAP Rules defines these as once per hour. WAC 317-21-200(5). *See also* WAC 317-21-205(1) and (2) (defining the international "sufficiently frequently" standard for fixing location and the federal "all pertinent information" requirement for voyage planning). These site-specific definitions of general terms cannot be viewed as conflicting with other requirements, but rather simply as correctly interpreting general guidance for the given area.

The Rules Are Likely to be Highly Effective in Preventing Oil Pollution.

10. It is my opinion that the BAP Rules are also likely to be very effective in reducing casualties in the Puget Sound

area. For example, the requirements for three licensed deck officers during periods of restricted visibility, pre-arrival inspection and planning, and additional training are all likely to help prevent the types of situations which can lead to accidents.

11. The navigation watch section requires the watch to consist of two licensed deck officers at all times and three during periods of restricted visibility. WAC 317-21-200(1). Given the fact that in Puget Sound there may often be extended periods of restricted visibility and that there are work hour limitations (imposed by federal law on U.S. flag ships and extended by the BAP Rules to all tankers in Washington waters, *see* WAC 317-21-245), this requirement may necessitate an extra deck officer on board to relieve one of the others during the Puget Sound passage. This requirement should be quite effective. Tankers entering the region generally have a fairly long period traversing these inland waters bordered by these sensitive lands. For example, from the entrance of the Strait of Juan de Fuca to several of the oil terminals there is a distance of approximately 100 nautical miles. A tanker cruising at 12-14 knots (a nautical mile per hour) and slowing upon approach to the terminal could easily take 12-14 hours to make this transit. This voyage, especially during periods of low visibility, will require the careful and constant attention of deck officers. The mandate for a third officer during periods of restricted visibility to oversee general operations and to be available to relieve one of the other two, who are charged with monitoring the navigation and collision avoidance systems, is likely to significantly decrease human-caused error during these longer, stressful transits. Moreover, this third officer requirement, while it may be new for many independent tankers, is already standard practice on many oil company ships. It is absolutely the "best available technology."

12. Similarly, the pre-arrival planning and inspection requirements, WAC 317-21-205(2), -215, reasonably provide the Washington State and federal port authorities the ability to better judge the capabilities of entering ships. This information provides the authorities with additional information which would be very useful in determining whether, for example, a ship should be denied entrance, should be prohibited from entering beyond Port Angeles, requires special escort or operational limitations, or mandates other conditions. This will, in turn, help prevent unforeseen or accidental casualties causing oil pollution. The pre-arrival inspection requirements likewise protect against what, in my experience, can be frequent causes of problems – an undiscovered, but pre-existing, mechanical failure.

13. Likewise, for example, the additional training requirements, WAC 317-21-230, should better prepare the crew for emergencies. It is important to recognize that many independently owned tankers may be owned by a company in one country, for example Sweden; have officers from another country, for example India; and a crew from a third country, for example the Philippines. The crew and officers may not have much experience working together beyond the voyage they are on. In addition, the pilot is likely to be from the port country, in this case the United States. Thus, there is a great need for explicit training exercises to ensure that all personnel are aware of the ship and its operations and can communicate effectively in time of need.

The BAP Rules Are Not Unduly Burdensome.

14. The BAP Rules, while environmentally protective, are in fact not unduly burdensome. As noted above, several requirements are no different than standard operating practice on ships operated by the oil companies. Most other requirements are very similar to those being imposed in the

relatively near future by the international community; the BAP Rules simply advance the implementation date. Finally, many of the requirements, such as additional training or inspection or pre-arrival planning, are really quiet modest and, from the point of view of day-to-day tanker operations, impose a very slight additional burden.

The BAP Rules Are Necessary Due to Lack of Registry State and Industry Enforcement.

15. Washington State in some ways is the forefront of oil spill prevention. But more fundamentally, the Washington BAP Rules merely reflect an unfortunate reality of the tanker industry: that states of registry (flag states) and the tanker industry itself have failed to eliminate and remove from service the substandard and unsafe ships. For example, over a decade ago, the 14 European nations agreed in the "Paris Memorandum of Understanding" that the port states would inspect 25% of all ships. This agreement reflected consensus on the fact that the flag states and the industry themselves had failed to impose sufficient requirements on tankers, thus requiring the port states to impose additional restrictions. Recently, other countries have joined into the Paris Agreement, including Canada, the United Kingdom, Australia and South Africa. Japan and the United States are considering joining. All this reflects the same reality faced by Washington State: that the port states need to protect their resources themselves and that they cannot rely on flag states or the industry.

16. The Puget Sound area is considered to be an extremely sensitive ecological system; indeed, Washington State provides a list of particularly sensitive environmental areas but notes that for "all practical purposes, all Washington waters should be considered environmentally sensitive." *See* Model Oil Spill Prevention Plan, p. 1-12. Moreover, the

Puget Sound environment can boast of great public support and interest. On the basis of my experience with tankers in all parts of the world, I believe it consistent with international norms for a specific area or jurisdiction to assess the importance of its waters and to impose additional oil spill prevention measures for its highly prized and sensitive waters. Such site-specific requirements represent, in my judgment, a very sound accommodation of the competing interests in protection of important ecological areas and the desire for relatively uniform tanker operation standards.

Conclusion

17. For the reasons stated above, I believe that the Washington State BAP Rules are reasonable and effective measures which are not inconsistent with or in conflict with other existing tanker operation standards, will help prevent oil spills and associated pollution, and will not impose an unreasonable burden on tanker operations. The Rules are, in short, the "best available protection" and should be upheld.

/s/ Arthur McKenzie
ARTHUR McKenzie

Sworn to before me this 3d Day of June, 1996

/s/ Peter Lehner
Notary Public

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C95-1096

The International Association of
Independent Tanker Owners
(INTERTANKO),
Plaintiffs,

v.

Barbara Herman, Administrator,
Office of Marine Safety, et al.
Defendants.

**DECLARATION OF SALLY ANN LENTZ
IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

Pursuant to the provisions of RCW 9A.72.085 and the provisions of Rule 13 of Washington State Rules of General Application,

I, Sally Ann Lentz, declare as follows:

1. I am a resident of Columbia, Maryland; a citizen of the United States; over the age of 18 years; and competent to be a witness herein.

2. International law regarding the regulation of international shipping is not uniformly accepted or applied.

a. Not all nations, nor all members of the International Maritime Organization (hereafter IMO) have ratified all treaties regarding the regulation of international shipping.

Attachment A (MEPC 37/2) is the most recent document from IMO on Status of International Conventions relating to Marine Pollution. The summary provided in the last few pages of this document clearly demonstrates that not all IMO member states have ratified the subject conventions. While most of the major flag states have ratified these conventions, as have most of the so-called "flags of convenience," they are not universally accepted. Nation states are free to "reserve" their position on specific provisions of the conventions, as well. For example, the United States has "reserved" its acceptance of Regulations 13F and 13G of Annex I of the International Convention for the Prevention of Pollution From Ships (hereafter Marpol). These regulations relate to the double hull mandate initiated by the U.S. Because U.S. law differs from these regulations in terms of the phase-in schedule for double hulls, as well as acceptance of other designs as equivalent to double hulls, the U.S. was unable to accept the international standards. Unilateral action by the U.S., as provided in this example, clearly shows that the federal government does not strictly adhere to uniformity with international standards.

The Marpol Convention itself in Article 16 (4)(b) allows a party to decline acceptance of an amendment to one of its annexes and states that, for purpose of application of that amendment, the declining state will be treated as a non-party to the convention, thereby releasing that state from the requirements flowing from the amendment. So the lack of uniformity is specifically allowed in the context of Marpol.

b. Even when ratified, the adoption of necessary implementing legislation varies.

Even when the international conventions have been ratified, there is no assurance that implementing flag state legislation has been adopted, nor that the legislation is similar

to that of other nations. The extent to which those countries which have ratified have actually adopted domestic implementing legislation is not well documented and may vary considerably.

c. International conventions that have been ratified and implemented are continually changing.

These conventions are in a constant state of "amendment." For example, Attachment B on Future Work on the Sub-Committee on Bulk Liquids and Gases (a newly formed Sub-Committee) which has the carriage of oil at sea on its agenda, indicates a major review of Annex I of Marpol, amendments to the International Convention of the Safety of Life at Sea (hereafter SOLAS) and review of existing ships' safety standards, among others.

d. Specific "guidelines" for implementing the various conventions are simply recommendations.

Many of the specific recommendations for carrying out the requirements of the conventions are simply that — recommendations in the form of "guidelines" which are not in the least bit mandatory. For example, as regards the double hull provisions of Regulation 13F of Annex I of Marpol, "interim guidelines" have been developed. Not only are these guidelines not mandatory, they are also "interim," as it is anticipated that they will be changed in the near future (See Attachment C). Also note in paragraph 14, the U.S. reservation on acceptance of the Guidelines to reflect the U.S. reservation on acceptance of Regulations 13 F and G generally.

e. An international "desire for uniformity" does not make it so.

Guidelines often refer to the "desire" for uniformity in implementation of the conventions as one basis for their development. However the guidelines merely "urge" their application by member states. Such application is not mandatory.

Indeed, none of the international agreements developed and implemented through IMO are expected to be uniformly complied with by the international shipping community, as it is up to individual member states to enact their own domestic implementing legislation to give force and effect to the convention provisions. IMO convention provisions are more often the "least common denominator," minimum standards that can be agreed upon internationally. Member states are expected (and sometimes encouraged) to enact more stringent standards. For example, under the International Convention for Safety of Life at Sea (hereafter SOLAS), individual flag states are required to adopt their own domestic implementing regulations to be applied to their registered vessels which are "at least as effective as that required by the [SOLAS Convention]" SOLAS, Ch. 1, Pt. A, Reg. 5.

f. The failure of flag states to meet their international obligations is recognized by IMO and specific efforts are underway to improve performance.

Lord Donaldson of Lymington was commissioned by the United Kingdom inn January, 1993, to examine, evaluate, and advise the U.K. government on whether international shipping standards are effective in preventing population. His report, *Safer Ships, Cleaner Seas: Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping* is an acknowledged treatise on this subject. As noted by Lord Donaldson, while flag states have a duty to ensure that their ships comply with international law, they are not

uniform in their determination or ability to discharge this duty.

The failure of flag states to meet their obligations under the conventions (by effective...let alone uniform...implementation) is well recognized and is the impetus behind establishment of IMO's Flag State Implementation Sub-Committee (hereafter FSI), which is tasked with improving flag state performance. Attachments D and E describe this problem. Note in particular the language in paragraphs 2 and 3 of Attachment D and paragraphs 1 - 4 of Attachment E. Both of these documents speak to the lack of uniformity in standards as they are applied to ships.

3. International enforcement is not uniform.

a. The disparity between flag states' ships "deficiencies" is dramatic.

Both implementation and enforcement of international conventions regulating shipping are not uniform. Attachment F provides some recent data on deficiency reports which suggests that some flag state's ships are more "deficient" than others. This is even clearer in Attachments G and H which provide data on the Paris Memorandum port state control program. Note in particular pages 66 - 69 – with regard to the percentage of inspections with deficiencies. On page 69 you will find that 45% of all tankers inspected were found to have deficiencies. This is an outrageously high percentage. Australia's port state control report (Attachment 1) provides similar, although not as dramatic, findings.

b. Flag state delegation to "classification societies" to ensure compliance with international standards has not solved the "deficiency" problems, nor the problem of non-uniform application.

Classification societies vary greatly in their competence and diligence. Attachments J, K, and L provide some information on delegation of authority to class societies. Attachment M is a recent article from Lloyd's List stating that only four of 13 members of the International Association of Classification Societies (IACS) have a top ranking in the U.S. Coast Guard's evaluation of class society performance. While IACs strives to ensure a high level of competence among all its members, it appears that, by the U.S. Coast Guard standards, IACS has not been entirely successful. Classification societies do not uniformly apply standards for vessels engaged in international oil commerce.

c. In the absence of effective flag state implementation, "port state control," as suggested in Lord Donaldson's Report, is the most effective way to achieve compliance with standards for safe shipping and protection of the marine environment.

Because of the failure of effective implementation of the convention standards by flag states and their delegated authorities, IMO has recently increased port state control authority. Port states, such as the U.S., the United Kingdom and Australia, are increasing their enforcement activities as a means to ensure safe shipping and protection of the marine environment. But reliance on port state control is expensive for those states, which feel that their burden is unfair. It is this inherent unfairness which drives proposals such as that put forward by the UK and Australia in Attachment D.

4. Most of the international conventions cited by the Plaintiffs have no relevance to this litigation.

a. OILPOL is no longer in force for the United States, having been superceded by Marpol 73/78. The

OILPOL Convention has no relevance to this litigation.

b. None of the BAP Regulations address any provisions within the International Convention on Load Lines (ICLL). The ICLL has no relevance to this litigation.

c. The 1982 United Nations Convention on the Law of the Sea (hereafter UNCLOS) has not been ratified by the United States, and thereby only has relevance to this litigation to the extent that it reflects customary international law.

d. COLREG provisions addressing navigational procedures are general in nature and are intended to be implemented and enforced through adoption of domestic legislation.

e. As noted above in para. 2(e), SOLAS anticipates the adoption of domestic regulations "at least as effective as that required by the [SOLAS Convention]."

f. None of the BAP Regulations directly address provisions under Marpol 73/78. That Convention, therefore, has no relevance to this litigation.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Signed at Columbia, Maryland, on June 3, 1996.

/s/ Sally Ann Lentz

Sally Ann Lentz

Sworn to before me this 3 day of June, 1996

/s/ Cathryn D. Zinkgraf
Notary Public

CATHRYN D. ZINKGRAF
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires April 20, 1998

ATTACHMENT C

INTERNATIONAL MARITIME ORGANIZATION

MARINE ENVIRONMENT PROTECTION COMMITTEE
37th session — MEPC 37/WP.3
Agenda item 14 — 12 September 1995
Original: ENGLISH

FINALIZATION OF THE INTERIM GUIDELINES UNDER REGULATION 13F OF ANNEX I OF MARPOL 73/78

Report of the Drafting Group

1. The drafting group met from 11 to 12 September 1995 under the chairmanship of Mr. M. Bockenhauer (Germany).

2. The meeting was attended by delegates from the following Member Governments

BRAZIL	NETHERLANDS
CANADA	NORWAY
DENMARK	PANAMA
FRANCE	POLAND
GERMANY	REPUBLIC OF KOREA
GREECE	SWEDEN
JAPAN	UNITED KINGDOM
LIBERIA	UNITED STATES

and observers from the following non-governmental organizations in consultative status:

INTERNATIONAL CHAMBER OF SHIPPING (ICS)
INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO)

3. The drafting group was instructed by the Committee to make necessary editorial changes in order to finalize the Draft

Interim Guidelines given in document MEPC 37/14 (Secretariat), taking into consideration the example for the application of the Interim Guidelines contained in document MEPC 37/14/3 (Germany).

4. The drafting group reviewed documents MEPC 37/14 and MEPC 37/14/3 and made editorial corrections to the text of the Interim Guidelines, as set out in the Annex.

Comments on editorial corrections

5. The title of the Interim Guidelines and the covering MEPC resolution for their adoption has been harmonized with the text of regulation 13F(5) of Annex I of MARPOL 73/78.

6. In paragraph 3.1, the word 'IMO' has been replaced by 'MEPC' in accordance with the text in regulation 13F(5).

7. In paragraph 3.2.5, a reference has been made to paragraph 6.2 relating to the verification of computer programme.

8. In paragraph 5.2.2, the missing functions have been inserted.

9. In paragraph 6.2.1, a reference has been made to the "Example for the application of the Interim Guidelines" and the annex of MEPC 37/14/3 has been incorporated as appendix to the Interim Guidelines.

10. Since Appendix 2 mentioned in paragraph 6.2.2 has not yet been developed, as an interim solution, the test of this paragraph has been corrected to read that the computer programme for the oil outflow analysis should be verified against the data for the oil outflow parameters for the reference double hull designs given in section 7. A reference to this paragraph has been made in paragraph 3.2.5 as mentioned in paragraph 7 above.

11. The group agreed to maintain "Reference Double Hull Design No. 4.2" as "Reference Double Hull Design No. 4" and to modify Tables 7.1 and 7.2 accordingly. Therefore, also Fig. 8.1 and Fig. 8.2 have been replaced by a new Fig. 8 on "Reference Double Hull Design No. 4 Deadweight: 283000 tdw", attached to this report.

Need for further work

12. The group is of the view that there is a necessity to elaborate a new Appendix containing examples for verification of the computer programme and this matter should be reviewed by the BLG Sub-Committee.

13. The group is of the opinion that the data of the original "Reference Double Hull Design No. 4.1" should be referred to the BLG Sub-Committee for future work on this subject.

14. The United States noted that the ultimate goal of pollution prevention regulations is to eliminate oil outflow from damaged tankers. The United States expressed the view that the weighing factor, k_1 relating to the probability of zero oil outflow, should be significantly higher than what is proposed in the Interim Guidelines. Accordingly, the United States reserved its position on the Interim Guidelines because they will permit alternative design and construction of oil tankers which could result in oil outflows in minor and low energy accidents. In no way could such designs be considered equivalent to the degree of protection afforded by the double hull tankers.

Action requested of the Committee

15. The MEPC is requested to approve the report of the drafting group, in general, and, in particular, to:

.1 approve the Interim Guidelines for approval of alternative methods of design and construction of oil

tankers under regulation 13F(5) of Annex I of MARPOL 73/78 given in the annex to MEPC 37/14 after incorporating therein the editorial corrections given in the annex to this report;

.2 adopt the Interim Guidelines by MEPC resolution contained in the annex to MEPC 37/14 after incorporating therein the editorial corrections given in the annex to this report; and

.3 consider the necessity to elaborate a new appendix containing examples for verification of the computer programme and to instruct the BLG Sub-Committee, as decided.

ATTACHMENT D

INTERNATIONAL MARITIME ORGANIZATION

SUB-COMMITTEE ON FLAG STATE IMPLEMENTATION — FSI 4/3/3
4th session — 19 January 1996
Agenda item 3.1 — Original: ENGLISH

IMPLEMENTATION OF IMO INSTRUMENTS

Responsibilities of Governments under safety and pollution prevention conventions

Flag State responsibility

Submitted by the United Kingdom and Australia

Background

1. This paper develops the proposals in the United Kingdom's paper FSI 3/3/5, as requested by the third session of the Sub-Committee.

2. It is widely known that substandard ships are operating internationally and the Secretary-General referred to it in his most recent World Maritime Day address saying:

> "Some governments are also quite happy to take the fees for registering ships under their flag but fail to ensure that safety and environmental standards are enforced".

This view is reflected by the experience of port States. In addition to the safety and environmental risks associated with the operation of substandard ships, their owners and operators are able to operate at an unfair competitive advantage.

3. The Annex to resolution A.740(18) which sets out the responsibilities of flag States provides useful guidance, and its value will increase as it is further developed by the Sub-

Committee, but the requirements of a resolution cannot be binding. We are concerned that the present situation does little to discourage substandard shipping: there is no sign that the activities of FSI are leading to a measurable improvement in safety. We consider that a mechanism is required that would ensure that flag States met their responsibilities under safety and pollution prevention Conventions.

Possible options for ensuring that flag States meet their responsibilities

4. We believe that to ensure that flag States meet their responsibilities would either require amendments to existing conventions or the development of a new convention. It is considered that there are four possible approaches:

(i) amend the United Nations Convention on the Law of the Sea;

(ii) amend the United Nations Convention on the Registration of Ships;

(iii) amend the existing IMO safety and pollution conventions (SOLAS, MARPOL, Load Line, etc.);

(iv) develop a new treaty instrument spelling out the rights and obligations of parties in relation to their responsibilities as flag States.

The United Nations Convention on the Law of the Sea (UNCLOS)

5. The United Nations Convention on the Law of the Sea (UNCLOS) addresses some aspects of the responsibilities of flag States. Article 94 sets out the duties of a flag State. This requires each State to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

It also provides for other States to report deficiencies to the flag State. Article 217 requires that States ensure compliance by vessels flying their flag with applicable international rules and standards and provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation may occur.

6. UNCLOS however contains no mechanism to implement and enforce the relevant safety and environmental provisions of IMO Conventions on ships registered with the flag State. And whilst it sets out in quite general terms the duties of a flag State, it does not amplify or explain what is required of a flag State in terms of technical expertise or administrative capability. A further consideration is that the Convention does not come within the scope of IMO and any amendment would have to be considered in accordance with the requirements of UNCLOS itself.

7. However, Article 311 (Relation to other conventions and international agreements) provides for other agreements setting out rights and obligations which are compatible with the provisions of UNCLOS. We consider that UNCLOS is not the appropriate vehicle for developing more clearly defined safety related obligations on flag States and another instrument should be used, provided it complies with the requirements of UNCLOS.

United Nations Convention for Conditions of Registration of Ships (UNCROS)

8. Article 5 of UNCROS requires flag States to have a competent and adequate national maritime administration, which is subject to the control of the State. However it contains no objective criteria against which a flag State can assess the competency of its maritime administration.

9. Furthermore, only a small number of States have signed or ratified UNCROS and it is not likely to come into force because of States' concerns about provisions unrelated to flag State responsibility. It cannot be amended before it comes into force and, like UNCLOS, it does not come within the scope of IMO. These are significant difficulties in using UNCROS as a mean of producing an instrument that effectively attributes responsibility to flag States.

Amendment of Existing IMO conventions

10. Whilst the existing IMO conventions on safety and pollution prevention could be amended to incorporate effective provisions on flag State responsibility, to do so would be very complex. Each Convention would have to be considered and amended individually. This would be extremely resource intensive and could interfere with work on safety or pollution amendments. Also there is no certainty that consideration of the amendments would progress at the same speed or maintain consistency, thus resulting in the risk of considerable confusion.

11. The amendments needed would be detailed and complex and there could be some difficulty in amending the Conventions in sufficient detail to ensure that the complex sovereignty issues could be adequately addressed.

Develop a new instrument

12. IMO has an excellent record for developing new instruments which are achieved by consensus and subsequently widely accepted and implemented. Development of a new instrument within IMO would have a number of significant advantages. These include:

- building on the work already done in drafting resolutions A.740(18) and A.739(18) together with

other relevant documents and standards;

- taking account of recent developments in the shipping industry, particularly the changing relationship between flag States, shipowners and shipmanagers;
- discussion within the forum which is concerned with the technical aspects of flag State responsibility, thus facilitating compatibility with other relevant Conventions;
- coming within the responsibility of IMO and being subject to the IMO procedures thus enabling its status to be considered regularly.

Primary Objectives of New Instrument

13. We consider that the best approach to improving flag State compliance would be the development of a new treaty, the technical provisions of which would be based on resolutions A.740(18) and A.739.(18). We accept that this would be a long-term project and that this should not interfere with other efforts to provide guidance and assistance to flag states in meeting their obligations.

14. The primary objectives of such an instrument would be:

(i) to set out clearly the responsibilities of the flag States and criteria against which their operation could be measured;

(ii) to provide a mechanism for the assessment of the operation of flag States by using objective criteria;

(iii) to facilitate the targeting of technical co-operation to those States unable to comply with the agreed criteria;

(iv) to identify measures, including sanctions, that may be necessary to ensure that States fulfil their obligations and responsibilities as flag States.

15. It is accepted that some States do not fulfil their obligations because of lack of appropriate resources in their marine administrations. Funding is available from a number of sources which could be used to assist flag States in meeting their obligations with respect to safety and pollution prevention conventions. One of the reasons that such funds have not been able to be deployed so far is the ability to specify clearly the aims of such assistance and objective criteria against which to measure the benefits.

16. Technical co-operation is a two-way process and it should be possible to incorporate a mechanism within the scope of a treaty by which flag States can be assessed and donor States can be satisfied that co-operation is targeted to States that take their flag State responsibility seriously. The existence of objective, agreed criteria for the operation of flag States, against which they could be measured would also enable the IMO technical co-operation programme to be deployed more effectively.

17. An outline of the provisions of a treaty likely to achieve the objectives of an effective new instrument is set out at annex.

18. The Sub-Committee is invited to consider the above proposals and develop them further in the course of FSI 4 and recommend to the MSC and MEPC that a new treaty instrument be developed which will ensure compliance by flag States with IMO safety and pollution prevention instruments.

* * *

ATTACHMENT E

ANNEX

DIRECTORATE FOR SCIENCE,
TECHNOLOGY AND INDUSTRY
MARITIME TRANSPORT COMMITTEE

NON-OBSERVANCE OF INTERNATIONAL
RULES AND STANDARDS:
COMPETITIVE ADVANTAGES

ORGANISATION FOR ECONOMIC CO-OPERATION
AND DEVELOPMENT
Paris, January 1996

FOREWORD

1. The majority of shipowners operate their vessels fully in accordance with international rules and standards. However some shipowners, due to the freedom to determine operating standards, operate their vessels at a substandard level. As a consequence, they enjoy a financial advantage which can reach a substantial amount of the running cost of the vessel. This situation occurs because there is often a lack of ensuring and/or monitoring compliance with international rules and standards as well as insufficient penalties for non-observance of international rules and standards compared to the financial advantages gained.

2. There is no simple solution to combat non-observance of agreed international rules and standards. Preventive and curative measures must be combined. Lasting solutions necessitate a co-ordinated co-operation of all participants in international shipping operations: flag State and port State authorities, classification societies, chartering and marine insurance interests, maritime labour unions.

NON-OBSERVANCE OF INTERNATIONAL RULES AND STANDARDS: COMPETITIVE ADVANTAGES[1]

1. In recent years, the shipping industry has been characterised by increasing concern over falling standards of vessel operations by a number of shipowners. This concern has been expressed by insurers, characters, governments and other interested parties, and has given rise to increased efforts to ensure shipowner compliance with national and international maritime rules as evidenced by greater frequency of ship inspections by insurance, chartering and port State interests.

2. In spite of this tightening-up process, shipping is still a largely free market which allows considerable scope for shipowners, *inter alia*, to: i) determine vessel operating policy including the level of expenditure on safety-related maintenance cost items, and ii) avoid compliance with internationally agreed rules and regulations as regards safety and the protection of the marine environment.

3. This latter situation is allowed to occur because the different bodies in charge of ensuring and/or monitoring compliance (flag State and port State authorities, classification societies, chartering and marine insurance interests and the maritime labour unions) vary in the degree of diligence they apply when conducting such activities and when following-up any non-observance of international rules and standards so detected.

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[1] This report is based on a more detailed OECD general distribution document (ref. OECD/GD(96)4) which is available from the OECD Maritime Transport and Shipbuilding Division.

4. The net effect of this approach is that, while the world fleet is now subject to a greater number of inspections that perhaps at any time in the shipping industry's history, standards of vessel operation vary considerably from the highly professional shipowners, who take a long-term strategic view towards the crew and technical management of their fleets, to the unscrupulous owners who disregard even the basic requirements of safe and pollution free vessel operations.

5. The aim of this report is to assess the competitive cost advantages which can be enjoyed by those owners who do not observe the fundamental maritime rules and standards relating to shipboard safety and environmental protection. Furthermore, it examines the respective roles of the industry bodies responsible for monitoring international rules and standards and discusses some of the possible solutions to the continuing problem of some shipowner non-observance.

I. FINANCIAL ADVANTAGES LINKED TO THE NON-OBSERVANCE OF AGREED INTERNATIONAL RULES AND STANDARDS CAN REACH A SUBSTANTIAL AMOUNT OF THE RUNNING COSTS OF A VESSEL

Financial advantages obtained by running vessels at different operating standards

- Considerable scope exists for shipowners to determine the operating standards of their vessels and to deliberately avoid compliance with international rules and standards which govern safety and pollution prevention in the shipping industry. By so doing, shipowners obtain financial benefits which can equate to a significant percentage of total vessel operating costs.

6. Deteriorating freight rates, financial pressures and increased competition have led some shipowners to cut back expenditure, *inter alia,* on the maintenance of vessels. Safety costs money and shipowners or operators incur expenditure in four main safety-related areas:

i) in providing for the maintenance of the vessel in a technically sound and seaworthy condition including the timely supply of necessary stores and supplies and regular overhauls/inspections of navigation, cargo handling, engine room and other machinery and equipment;

ii) in ensuring that life-saving appliances, fire-fighting equipment and other safety items are kept in a state of readiness;

iii) in providing appropriate training of seafarers and office staff including regular drills and exercises;

iv) in establishing and maintaining a well-organised and disciplined safety management system (SMS), encompassing both ship and shore operations, including regular safety inspections, internal audits, management reviews and report/follow-up of accidents, incidents and deficiencies.

7. There are no hard and fast rules to determine how much an owner/operator should spend on vessel safety in order to conform to international rules and standards and, often, no separate budget for safety or training is maintained. Much depends on the age and type of vessel, its trading pattern and the experience of the crew. Therefore, it is difficult to establish, with any precision, during a shipboard inspection, whether too much or too little is being spent on safety and, in the latter case, how much is needed in order to rectify any observed deficiencies.

8. Vessel operating standards vary considerably from the "blue chip" shipowners who choose to maintain vessels at a very high standard, i.e. far in excess of the minimum required by the vessel's class, flag State and any additional requirements of insurers, charterers or financiers, to those owners who, for whatever reason, choose to maintain their vessel at the minimum standard acceptable to continue trading legally or deliberately below. The financial implications of the freedom enjoyed by shipowners in determining vessel operating policies is illustrated by the following diagram in terms of theoretical vessel operating levels. It depicts maximum (ceiling) and minimum (floor) levels of expenditure in relation to "good" and "common" (or average) practice within the shipping industry.[2]

9. For example, for a late 1970s built bulk carrier (30 000 dwt) operating within the current handy size time charter market, different levels of operating costs depending on safety levels, with a crew of identical size and nationality can be defined. Important differences in the operating costs exist. If the vessel is operated at the maximum level of safety, per day expenditure will amount to around US$7 500. If, however, the vessel is kept operational at a level just to ensure the owner's compliance with basic standards of safety, the daily expenditure will only amount to some US$3 250.

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[2] The data cited in this report, while based on actual figures obtained from industry sources, should be considered as purely indicative and reflect a given situation at a given time.

VESSEL OPERATING COST "LEVELS" AND FINANCIAL ADVANTAGES

(period of reference: end 1994)

(20 year old bulk carrier; 30 000 dwt) US$/Day		**(1990 built product tanker; 40 000 dwt) US$/Day**
7 500	Ceiling (1)	9 500
4 500	Good Practice (2)	4 850
3 750	Common Practice (3)	4 250
3 250	Standard (4)	3 750
2 750	(6) Floor (5)	3 100

(1) Ceiling = level of maximum expenditure (influenced by financial revenue earning potential of the vessel in the freight market and financial costs of owner).
(2) Good Practice = high level of expenditure adopted by minority of shipowners.
(3) Common Practice = average level of expenditure adopted by majority of shipowners.
(4) Standard Practice = minimum level of expenditure to ensure owner's compliance with basic standards of safety.
(5) Floor = level of minimum expenditure (still keeping the vessel "operational").
(6) Shaded area = margin of substandard operation which the shipowner is able to operate a vessel subject to non-detection by regulatory authorities (flag States and classification societies acting on behalf of flag States, port States, etc.).

10. But what is more important in relation to the safety of navigation and the prevention of pollution of the marine environment is the difference between the level which corresponds to the minimum level of expenditure to ensure owner's compliance with international standards, and the so-called "floor level", which corresponds to the minimum expenditure keeping the vessel operational. There exists a "shaded area" within which a shipowner can operate substandard vessels[3] subject to non-detection by one or a number of regulatory authorities (flag States and classification societies acting on their behalf, port States, etc.). The margin of substandard operation for such a vessel ("shaded area") can equate to a 13 per cent saving (US$ 500 per day or US$ 182 500 per year) on the annual running cost. Similarly for a 40 000 dwt 1990 built product tanker working within the time charter market, the margin of substandard operation equates to US$ 650/day or US$ 237 250/year, equating to a 15 per cent saving on the annual running costs.

* * * *

[3] Substandard vessels deserve the qualification "substandard" purely on the basis of shipboard and shorebased management, levels of maintenance and training of the ship's crew not being in accordance with agreed international rules and standards.

II. LACK OF POLICING OF THE SHIPPING INDUSTRY BY PRIMARY POLICING BODIES (FLAG STATES AND CLASSIFICATION SOCIETIES ACTING ON THEIR BEHALF) AND INSUFFICIENCY OF PENALTIES FOR NON-OBSERVANCE OF RULES AND STANDARDS

The role of the flag State

- It is the responsibility of the flag State to identify instances of substandard operation which pose a serious risk to safety of life at sea and the protection of the marine environment. However, frequently, flag State Administrations are not in a position to fulfil their responsibilities in implementing international rules and standards either directly or indirectly through classification societies. No attempt has yet been made to standardise the way in which flag State inspections should be conducted, although the examination of different ship registers reveals similarities in their approaches.

18. Flag States, in order to comply with existing internationally agreed rules and standards, as laid down in the Law of the Sea text, have effectively to exercise jurisdiction and control in administrative, technical and social matters over ships flying their respective flags. In particular, flag States are required to take the necessary measures to ensure safety at sea, including the manning of ships, labour conditions and the training of crews, the construction, equipment and seaworthiness of ships. Flag States are furthermore also obliged to ensure that each ship is in charge of a master and officers who posses appropriate qualifications. However, there is growing evidence showing a strong correlation between marine casualties and certain flags of registration. There are still a number of flag State

Administrations not adhering to minimum standards of supervision.

The role of classification societies

19. In the absence of flag State inspections, classification societies, acting on behalf of flag States, have an important State's enforcement powers behind them, which could effectively mean much swifter penalties for non-compliance, for example the inability of ships to leave port when their certificates are not in order. The ultimate sanction for non-compliance with the classification rules is the loss of class, which is the basis for charter parties and insurance. Due to different standards among the various societies owners can "shop around" to keep their vessels in class despite the inability to meet the rule requirements of the "holding" classification society. However, it should be noted that through IACS' (International Association of Classification Societies Ltd.) recently concluded Transfer of Class Agreement it has been agreed that the gaining society accepts the vessels for its classification only after all overdue surveys, recommendations or conditions of class previously issued against the vessel have been completed as specified by the losing society.

The insufficiency of penalties

- Given the present legal framework, penalties applied to substandard vessels are, if they exist at all, relatively low compared to the advantages obtained from non-observance of international rules and standards.

20. In the present legal framework there is no provision to apply penalties when a vessel is detected with deficiencies, unless the deficiency represents a breach of conventions containing a repressive mechanism (MARPOL, for instance). The only penalty applied is the detention of the vessel.

However, detention is not a strong deterrent. In the example cited above, the off-hire statement shows a financial cost of approximately US$ 16 000. Compared with the daily US$ 500 of financial benefit for owners who operate the vessel at the floor level, this represents only 32 days of operation.

21. There are, at least, two main reasons as to why administrative penalties should be applied. On the one hand, this would contribute to eliminating the cost advantages of running a substandard ship. On the other hand, this would transfer the cost of control from the port authorities to the shipowner. Considering that an average visit requires two inspectors for two hours, Members of the Memorandum of Understanding (MoU) estimated in 1992 that the average cost of a visit amounts to 240 ECUs.[5] As the port authorities of the MoU carried out 17 294 inspections during 1993,[6] this means that, in 1993, port authorities invested at least 4 million ECUs for inspections, although it has to be noted that the overall cost of the inspections accrued to the port State are significantly higher.

22. However, when deficiencies are detected, certain states impose fees for the subsequent inspection of vessels. These fees are based on the assumed cost of the visit (60 ECUs per man per hour). This practice remains an exception.

23. Typical deficiencies detected during annual flag State/classification society inspections demonstrate that, while the majority are of a minor nature involving only small cost savings, certain major deficiencies can involve substantial

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[5] See The Memorandum of Understanding on Port State Control, Annual Report 1992, page 4.

[6] See the Memorandum of Understanding on Port State Control, Annual Report 1993, page 29.

financial implications, particularly if they should have, but due to non-detection have not, resulted in an immediate disruption in the vessel's ability to trade. Existing penalties for substandard operations are no deterrent: on the contrary, if existent at all, their low level is almost an encouragement to operate substandard, as savings by operating below international norms and standards by far outweigh any penalty.

III. LASTING SOLUTIONS TO COMBAT NON-OBSERVANCE OF AGREED INTERNATIONAL RULES AND STANDARDS NECESSITATE CO-ORDINATED CO-OPERATION OF ALL PARTICIPANTS IN INTERNATIONAL SHIPPING OPERATIONS

IMO initiatives to improve international rules and standards and their implementation

- IMO being the prime body for the adoption and the implementation of international rules and standards, its work is of the utmost importance for the upgrading of flag State inspections;
- All IMO initiatives for a better monitoring of the implementation of international rules and standards, and an improved co-ordination of the actions against substandard vessels, should be welcomed;
- By providing owners and operators with a useful industry-wide organisational framework, the ISM Code represents the latest example of a policy towards the improvement of minimum standards of safety and the phasing out of substandard vessels.

24. There is a compelling case for all flag States to demonstrate that they are carrying out their supervisory

responsibility effectively as non-compliance with international rules and standards leads to unfair and thus unacceptable competition. In accordance with decisions taken in the International Maritime Organisation, flag States have to live up to their obligations and make transparent the work of their maritime administrations with regard to how they implement and comply with IMO conventions and rules on safety and pollution control.[7]

25. The monitoring and harmonisation of flag State implementation of IMO rules and conventions would contribute to a better co-ordination of flag States and classification societies acting on their behalf. In particular, the creation of a common database showing the safety status and record of vessels (ISI - International Ship Information - database) will effectively enhance the efficiency of the fight against substandard operation.

26. Safety requirements need permanent upgrading. In this field, the implementation of resolution A.741 (18) – the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code) – is of the utmost importance as it represents the latest attempt to improve minimum standards of safety. Proper implementation of the ISM Code will undoubtedly lead to a phasing out of a number of substandard vessels and thus contribute to a "level playing field" among shipowning companies. Since the introduction of the ISM Code, an increasing number of

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[7] See Statement by OECD Member countries on the Enforcement of International Rules and Standards in Maritime Transport [SG/PRESS(94)53]. In addition to OECD Member countries the following additional countries have subscribed to the statement: Bulgaria, the Czech Republic, Estonia, Hungary, Korea, Latvia, Lithuania, Poland, Romania, Russia and the Ukraine.

shipowning and operating companies have committed greater resources to "upgrading" their existing management systems.

Port State inspections should be further strengthened and better co-ordinated

- Findings of vessel inspections, as conducted by flag States and classification societies acting on their behalf, demonstrate that there is still considerable room for improvement, both in terms of the technical condition of vessels and ship operating practices;
- Shortcomings, of the effectiveness of vessel inspections by certain flag States and classification societies acting on their behalf, force OECD Member countries to call for improved and better co-ordinated port State inspections;
- Enforced port State inspections would eliminate substandard vessels and competitive advantages obtained by shipowners who do not observe international rules and standards.

27. Given the ineffectiveness of certain flag State/classification society inspections, the Port State Inspectorates are now widely viewed as a very, if not the most, important policing mechanism for the shipping industry, which must continue to act as a "safety net" for the flat States. Port State inspectors, while not carrying the same responsibilities as those of the flag States, are able to investigate in detail the various safety aspects of vessels; they go much further than just a mere double checking of a ship's certificates by examining areas such as crew competence. They are also able to act on any deficiency noted, by preventing a vessel from proceeding on its voyage and by notifying the flag State and next port accordingly of any significant deficiencies.

28. Port States, as well as flag States, should adopt the necessary measures to make it more difficult to obtain the financial advantages enjoyed by those shipowners who do not observe international rules and standards. These measures should be sufficient to minimise or ideally offset the financial advantages resulting from the operation of substandard vessels. Consideration should be given to increasing the effectiveness of port control, *inter alia,* by:

i) tighter inspection rules;

ii) elaboration of a common policy on harmonisation of detention criteria and detainable items;

iii) a possible wider and co-ordinated geographical coverage of port State inspections;

iv) an increase in random checks;

v) the assessment of the port state of the human element;

vi) improved follow-up of corrective actions;

vii) a greater transparency and increased publication of instances of substandard operations list of vessels);

viii) adapted numerical staff and intensified training efforts for port inspectors.

The responsibility of the industry in combating non-observance of international rules and standards

- There is no simple solution to the problem of substandard ship operation. Greater policing alone will not prevent substandard vessel operations: it is necessary to combine preventive and curative measures;

- The industry has an important policing role to play in co-ordination with flag States and classification societies acting on their behalf effectiveness is dependent on good co-operation among the various participants in maritime transport including the harmonisation of how inspections are conducted and, importantly, how corrective actions are followed up;

- The industry has to commit greater resources to preventing problems occurring in the first place rather than on corrective action.

29. The immediate concern is to improve the involvement of the industry in preventive actions. In 1993 this safety and quality management "movement" accelerated with the IMO's adoption of resolution A.741(18) - the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code). Based on this understanding, a more organised Safety Management System-type approach to shipboard safety has been brought about in recent years, together with the development of quality standard management systems. However, the movement towards an SMS-type approach is still in its early stages and while more and more ship-owning and ship-operating companies are committing greater resources to safety management, the dissemination of the SMS-approach throughout the industry is proving to be a slow one. A major reason for this is that safety management is not, as yet, a mandatory requirement.

30. As a result of a new chapter (IX) of SOLAS, compliance with the ISM requirements will be mandatory for certain ship types from July 1998. This represents a milestone in the industry as it determines, for the first time, a minimum standard of safety management and pollution prevention encompassing shipboard and office operations.

31. Insurers and charterers are now playing an active role in monitoring compliance with international rules and standards in order to have a more reliable basis for the protection of their commercial interests. Greater co-operation within the industry, including maritime unions, and between the industry and flag States and classification societies acting on their behalf, including the exchange of information, should favour the high standard vessel operators.

32. Until such greater involvement of the industry is achieved and international rules and standards are stringently observed, the shipping industry will be characterised by what is a two-tier market in ship operating standards. The upper tier comprises those owners who take a responsible attitude to safe ship operations and enjoy, as a result, access to most charterers and trade routes. The lower tier, by contrast, is made up of owners and operators who continue to circumvent or ignore accepted rules and regulations and who will be targeted more and more in the future to undergo shipboard and office inspections and who will be afforded limited access to certain trades and charterers.

ATTACHMENT TO
DECLARATION OF DARIN BARTRAM

STATE OF WASHINGTON

OFFICE OF MARINE SAFETY

August 30, 1993

Rear Admiral A.E. Henn
Chief, Office of Marine Safety
Security and Environmental Protection
U.S. Coast Guard Headquarters
Room 2408
2100 Second Street S.W.
Washington, D.C. 20593

Dear Admiral Henn:

This will acknowledge that your letter of August 25, 1993 has been received by this office. We are concerned and troubled by your letter at this late date and feel compelled to provide the following response. I very much regret that your office has reduced our communications on this issue once again to an eleventh-hour fax exchange.

We are troubled by the apparent inability of the Coast Guard to maintain a dialogue with the State of Washington on these issues. Your letter yesterday is a mirror image of events which occurred just two months ago.

In that case, Washington State contingency plan requirements, effective July 1, 1993, were long on the books, widely distributed in the maritime community, and well known by the Coast Guard. Yet, our first official notice from the Coast Guard came in your letter of June 23, 1993 (one week before the rules took effect) expressing objections similar to the ones you pose now to OMS prevention rules. It was your position

then that our office should follow the Coast Guard's lead and impose no contingency plan requirements on in-transit vessels pending Canadian action. As you know, the Canadian spill response program is anticipated to take two years to implement. Through some creative solutions fashioned by Washington State, we were successful then in avoiding jurisdictional conflict while at the same time protecting Washington waters.

Significantly, however, at that time I advised of the September 3 deadline for prevention plans and requested a meeting to discuss this issue and to work cooperatively toward a solution. After a month of no response, I requested meetings with Captains Donohoe and Russell whom I understood were authorized to speak for the Coast Guard on these issues.

My meeting with Captain Donohoe on August 19, 1993 in Seattle was uneventful. Captain Donohoe did not know what the problem was and seemed understanding of Washington State's desire to gather information from vessels in Washington waters for oil spill prevention purposes. He said he would discuss these issues with you upon his return to Washington D.C. and advise further.

Captain Russell was unable to meet with me at the scheduled time on August 23, 1993. During a telephone conversation, he subsequently urged me to talk with Captain Donohoe and I requested that a message be given to Captain Donohoe to call me. The next day Captain Donohoe called to advise that a letter was being faxed to us and that he preferred not to talk with us until after we had received the letter. At that point, again, one week before the impending deadline, we received a letter from you raising jurisdictional issues, suggesting litigation, requesting that we not enforce Washington State oil spill prevention laws, and suggesting that we work together to solve this problem.

This series of events does not represent the type of partnership between the federal government and the state of Washington we believe is appropriate to protect the public interest in oil spill prevention programs.

Throughout our rulemaking process, we have worked closely with the state Attorney General's office on the legal issues you have raised. We have been advised by counsel that Washington State law in this situation is valid. Legal advice from that office making clear the validity of Washington's laws and regulations will be available shortly.

Washington State's oil spill prevention laws provide an opportunity, not a problem, for enhancing now this region's spill prevention programs. Our office is mandated by the Legislature to establish "best achievable protection" standards for tank vessels transiting Washington state waters. Under our regulations, all tank vessels must file on September 3, or prior to operating in Washington waters, information describing the vessel's current prevention measures and procedures. This office will review submitted material to establish "best achievable protection" standards. This phased and studied approach to prevention planning will benefit all jurisdictions in devising new strategies for preventing oil spills from tank vessels operating in shared waters.

This is not an instance of Washington State extending jurisdiction to the territorial seas. Vessels in question have entered and are transiting Washington State internal waters. The particular resources at risk, the Strait of Juan de Fuca and the San Juan Islands, are proposed for National Marine Sanctuary designation by NOAA and are among the most environmentally significant marine resources in the State. The notion that Washington State officials should suspend implementation of state spill prevention laws to attend committee meetings while a substandard oil tanker, licensed

by a flag of convenience, is weaving its way through the San Juan Islands is not an acceptable proposal to the citizens of this state.

Significantly, so far as we are aware, Canada does not at this time have comparable prevention programs. We are aware of ongoing discussions at the international level which may lead to some program in the future. The bottom line is that Washington State is offering a spill prevention program for these waters and is attempting to provide this protection now, when it is needed, and without further delay.

Your request that Washington State waive application of state spill prevention laws and instead attend committee meetings designed to lead to some future international standards is not well taken. If a comprehensive and effective international regime existed for oil spill prevention, our office would not exist. It has been the failure of the international community to establish and enforce effective international prevention programs that has driven states like Washington to take these matters in their own hands and establish programs necessary to protect state waters.

As you know, Congress debated preemption at length and made the decision to allow states the freedom to protect their waters. We are committed to a partnership with the Coast Guard toward coordinated and cost effective programs and are pleased with the cooperative stance which the Thirteenth District has taken with respect to our programs. Quite frankly, we are frustrated with the focus the Coast Guard in Washington D.C. is placing on jurisdictional issues, litigation, and posturing for our Canadian neighbors, rather than on cooperation and environmental protection.

We remain committed to working with you on solutions, but these solutions must recognize the valid oil spill prevention

programs of the state of Washington as well as long-term international solutions.

At the current time, we will expect on September 3, 1993 that all tank vessels operating on Washington State internal waters will be in compliance with Washington State law.

Sincerely,

/s/ Barbara Herman
Barbara Herman
Administrator

BH:bjj
cc: Admiral John W. Lockwood

STATE OF WASHINGTON

OFFICE OF THE GOVERNOR

August 30, 1993

Commandant (G-C)
J. William Kime
United States Coast Guard
2100 Second Street S.W.
Washington, D.C. 20593-0001

Dear Commandant Kime:

I write to express the strong commitment of the state of Washington to enforce state oil spill prevention laws, to work in a partnership with the U.S. Coast Guard to advance international tanker safety standards, and to protect Washington State waters now from the ever-present threat of a worst case oil spill. I am alarmed, however, at correspondence received last week from the Coast Guard which threatens to undermine that partnership.

While some six billion dollars are being spent by government and industry making much needed improvements to this country's oil spill response capability, I am extremely proud that the state of Washington is the national leader in adopting and implementing oil spill prevention legislation. Our Office of Marine Safety, less than two years old, is on the cutting edge of developing nationally innovative oil spill prevention programs. Foremost is a requirement mandated by our Legislature for all oil tankers operating in Washington waters to submit oil spill prevention plans to that office by September 3, 1993.

In Admiral Henn's August 25, 1993 letter, the Coast Guard is requesting, one week before the September 3 deadline, that Washington State suspend application of valid state laws

designed to prevent oil spills in Washington's most environmentally sensitive areas, the Strait of Juan de Fuca and the San Juan Islands. Instead, the Coast Guard recommends that state representatives attend committee meetings which may eventually lead to new international prevention standards. This Coast Guard proposal is totally unacceptable to the state of Washington.

The U.S. Coast Guard must support principles of international law and work cooperatively with our valued Canadian neighbors. Washington State strongly supports your efforts and appreciates and accepts the Coast Guard's invitation to participate in international forums designed to establish new and needed regulatory standards for tanker safety. The very purpose of Washington State's new prevention laws, however, is to provide protection now in Washington State waters. This goal is not inconsistent with mutual ongoing efforts toward long-term international solutions.

Washington State is simply unable and unwilling to wait for the long and often cumbersome international process to run its course while areas like the San Juan Island lie at risk today of a potentially worst case spill that could devastate Washington State's most environmentally sensitive areas.

I urge the U.S. Coast Guard to reconsider its present course. In doing so, I pledge the complete effort of Washington's Office of Marine Safety to work cooperatively with the U.S. Coast Guard and to seek solutions to your jurisdictional concerns, while pressing forward with Washington State oil spill prevention programs.

Very truly yours,

/s/ Mike Lowry
Mike Lowry
Governor

ML:BH:bjj
cc. Washington State Congressional Delegation
Rear Admiral A. E. Henn, U.S. Coast Guard
Rear Admiral John W. Lockwood, U.S. Coast Guard
Barbara Herman, Administrator, Washington State Office of Marine Safety

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR

CAUSE NO. C95-1096

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,

v.

MIKE LOWRY, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MCEACHRAN, Prosecutor of Whatcom County; DAVID NEEDY, Prosecutor of Skagit County; JAMES KRIDER, Prosecutor of Snohomish County; and NORMAN MALENG, Prosecutor of King County,
Defendants,

and

THE WASHINGTON ENVIRONMENTAL COUNCIL; THE NATURAL RESOURCES DEFENSE COUNCIL; and OCEAN ADVOCATES, INC.,
Intervenors.

SECOND AFFIDAVIT OF STANLEY J. NORMAN

STATE OF WASHINGTON)
) ss.
County of Thurston)

My name is Stanley J. Norman, Commander, United States Coast Guard (retired), and member, Nautical Institute. I am the Program Director for Policy and Planning at the Washington State Office of Marine Safety (OMS). I am a citizen of the United States, over the age of 18, and competent to provide testimony in this matter. My complete background is set forth in the Affidavit of Stanley J. Norman which was attached to the State Defendants' Motion For Partial Summary Judgment (hereafter "1st Norman Aff.").

This affidavit is filed in response to Intertanko's Motion For Summary Judgment.

I. *Coast Guard Involvement In The Best Achievable Protections Standards Development Process*

The U.S. Coast Guard was represented and participated in the Office of Marine Safety's development of Best Achievable Protection (BAP) standards from the very beginning of the process. When the Washington State Advisory Group on best achievable protection standards for tank vessels was formed and chartered, the U.S. Coast Guard Thirteenth Coast Guard District Marine Safety Office provided a representative to participate on the Advisory Group, Coast Guard Lieutenant Commander Tom Orzech, who attended all of the meetings. In addition to Commander Orzech's participation, he reportedly took the minutes of the meetings, all the drafts developed on standards and on rules, and between the meetings provided those to the Marine Safety Office at U.S. Coast Guard Headquarters in Washington, D.C. for comment. When the materials arrived at U.S. Coast Guard Headquarters, Captain Brian Basel copied them and distributed them to all affected offices throughout Coast Guard Headquarters, requested comments, and when comments were received, referred them to Commander

Orzech who brought them before the Advisory Group at the next meeting.

At the point in the process where the Advisory Group had completed work on the standards and was preparing to review the draft rules, I traveled to U.S. Coast Guard Headquarters in Washington, D.C. to brief the senior officials who had been reviewing the materials all along. Following that meeting, Captain Basel indicated that while the Coast Guard could not, as a federal agency, endorse the state standards, they were acceptable and encouraged the state of Washington to continue along the lines we were proceeding because the standards were consistent with the Coast Guard's work within the International Maritime Organization and also consistent with the OPA 90 (also referred to as the "Act") federal legislation for tank vessels. (*See* Minutes of the Advisory Group Meetings, Exhibits 4 to 9 to 1st Norman Aff., and Coast Guard Headquarters Trip Report, Exhibit 11 to 1st Norman Aff.) The letter from Captain Basel is attached to this affidavit as Exhibit 1.

The active participation of the Coast Guard in the BAP rule development process was consistent with the spirit of the Agreement on Oil Pollution Prevention and Response between the Thirteenth Coast Guard District and the state of Washington, which was being negotiated during the same time period and was subsequently signed by Washington Governor Mike Lowry and U.S.C.G. Rear Admiral J.W. Lockwood, Commander, Thirteenth Coast Guard District on April 24, 1995. Under that agreement, the state and the Thirteenth Coast Guard District agreed to "cooperate and to coordinate their efforts in implementing and exercising their respective statutory and regulatory duties related to oil spill prevention and response." Memorandum of Agreement at 2. A copy of the Memorandum of Agreement is attached as Exhibit 2. The

Memorandum of Agreement includes a specific section on Relation to Federal and State law which reads as follows:

> Nothing in this Agreement is intended to, nor shall operate to, preempt Federal or State law. Any actions taken under this Agreement shall be consistent with, and may be limited by, applicable law, regulations and policies.

In a memorandum from the U.S. Coast Guard Commandant Rear Admiral A.E. Henn, Chief, Office of Marine Safety, Security and Environmental Protection dated May 19, 1993, Admiral Henn recognized that OPA did not preempt states' rights. *See* Exhibit 3. He stated that the Coast Guard and the states must be committed to work together to "complement rather than duplicate" oil spill prevention requirements. The involvement of the Coast Guard in the BAP development process was an effort to do just that.

II. *Waivers to Compliance With BAP Rules*

Intertanko's Memorandum In Support Of Motion For Summary Judgment indicates a misconception regarding the waiver provision of the BAP rules. *See* WAC 317-21-520. The waiver provision in the rules is intentionally very broad and waivers are liberally granted. Some examples of waiver requests and the OMS response are attached as Exhibits 4 and 5.

One of the situations where a waiver is frequently requested and granted is when compliance with the BAP standards, in particularly the drug and alcohol use reporting requirement, may conflict with other local, state, or federal laws governing the crew on a vessel coming to Washington waters. In that case, the existing law is used as a basis for granting a waiver for compliance with that provision of the best achievable protection standards.

Another provision that is not clearly understood by some, including Intertanko, is that the statute (ch. 88.46 RCW) specifically prohibits the Office of Marine Safety (OMS) from enforcing rules that would cause noncompliance with an existing collective bargaining agreement. Again, this issue is frequently cited in the plans in the section on drug and alcohol testing. Some collective bargaining agreements in existence address the issue of drug and alcohol testing and that portion of the BAPs that are in conflict with the Agreement, if any, are waived by OMS. An example of this issue was brought to our attention by SeaRiver Maritime and The Exxon Seamen's Union. The intent of the company was to test all employees. The collective bargaining agreement contains a provision for drug and alcohol testing of the stewards department (the cooks). Testing is excluded by the collective bargaining agreement except in certain circumstances. In order to allow SeaRiver to adhere to its collective bargaining agreement with the Exxon Seamen's Union, a waiver will be granted for that portion of their plan. OMS will ask SeaRiver to do everything in their power to include drug and alcohol testing of the stewards department as required in the regulations the next time the collective bargaining agreement is negotiated. If they are unable to do so, OMS will continue to waive the requirement.

III. *Washington Regulation Outside the Three-Mile Limit*

Section IV(D) of Intertanko's Memorandum in Support of Motion for Summary Judgment indicates a misunderstanding of Washington's intent concerning some of the best achievable protection standards that appear to apply outside of Washington's three-mile limit of state waters. WAC 317-21-130 requires owners and operators of tank vessels which come into Washington waters to report events anywhere in the world in a summary form. This provision is not used and may

not be used to enforce or take action against a tank vessel owner or operator for an event that did not occur in Washington waters. Rather, this provision is intended to collect information on events in order to measure the effectiveness of prevention measures implemented by the company to protect Washington's waters from a potentially disastrous oil spill.

This provision is also consistent with the current efforts in the International Maritime Organization (IMO) to create a worldwide database of inspections and casualties that would be accessible to all government agencies. The database will take some time to develop. In the meantime, in order to measure the effectiveness of prevention programs, OMS, with the concurrence of its Advisory Group, requests a summary of events that occur on covered tank vessels anywhere in the world. However, OMS has jurisdiction to act only on those events that occur on Washington waters. There was never any intent to use event information to regulate vessels outside of Washington waters.

WAC 317-21-200(2) requires creation of a standardized bridge resource management system for all vessels in a company's fleet. Since these rules only apply to the fleet of vessels covered by the plan, which are those vessels that may operate in Washington waters, the "fleet" in this case refers only to those vessels that will operate in Washington waters. *See* Exhibit 6. The provision for a consistent bridge resource management system within a fleet was inserted at the recommendation of vessel managers on the Advisory Group who frequently moved crews between vessels. The intent is to have a universal system for a fleet of vessels to allow owners and operators the flexibility to move trained personnel between vessels without having to retrain them in the three

primary functions, navigation, collision avoidance, and administration, for each vessel on which they embark.

WAC 317-21-230 requires implementation of crew training and drill programs. The provision does not require that the training and drills be done outside Washington waters. In order to have flexibility to use the training programs and resources traditionally available to companies, a company can choose to conduct some of the training and/or drills outside Washington waters. There is certainly no prohibition on accomplishing the training and drills outside Washington waters if a company so chooses. However, all the training and drills can be accomplished within Washington.

WAC 317-21-240 and 317-21-255 are record keeping requirements which allow a company to administer their programs outside Washington waters, but do not mandate it. The records may be carried on the vessel or kept at another location. It is at the option of the company. The Advisory Group believed that companies should be able to choose to maintain records at their company headquarters for convenience and for reference. The important thing was that these documents could be made available to OMS within 72 hours. Consideration was given to factors such as weekends, overseas delivery, faxes, and the like. The intent was to allow the owner-operator of tank vessels flexibility to work within its existing system and locations to maintain as few new or duplicate records as possible and to simplify the process of compliance with the best achievable protection standards. There was no intent on the part of OMS or the state of Washington to regulate outside Washington waters.

Finally, WAC 317-21-260 requires potential revision to tank vessel owner and operations management program. Again, management programs involve the company and the vessel. The intent is to regulate the management of the vessel

while it is in Washington waters. If a company chooses to obtain certification and only apply that certification in Washington waters, that is entirely up to the company. The regulations were written to provide flexibility to the owners and operators, not in an attempt to regulate outside Washington.

IV. *Clarification of Pilotage Requirements*

In response to Intertanko's Memorandum In Support Of Motion For Summary Judgment, Sections IV.B.3.d., OMS states that BAP regulations do not conflict with federal pilotage requirements in any way. All Washington state pilots are also federal pilots. Federal pilotage in the state of Washington is provided by state pilots. All vessels in the international trade are required to take on state/federal pilots upon arrival at the Columbia River mouth or as Port Angeles in the Strait of Juan de Fuca. In fact, the U.S. Coast Guard requires mandatory pilotage in Puget Sound. If the state does not establish a mandatory system, the federal government will intervene and make pilotage mandatory.

With regard to the coast-wide traffic, most tankers in the coastal trade are those coming to Washington from Valdez, Alaska. While many of these ships carry masters and mates with federal pilotage endorsements for the Puget Sound area, as a matter of policy nearly all the U.S. flag tankers on the Valdez, Alaska to Puget Sound route still take state-licensed pilots for safety reasons when they sail through Puget Sound. Foreign tankers do not have that option. The crews on foreign tankers do not have U.S. Coast Guard federal pilotage endorsements for Puget Sound. Vessels in the international trade are required to take state/federal pilots. A copy of chapter 88.16 RCW, the Pilotage Act for Washington State, and chapter 296-116 WAC are attached as Exhibits 7 and 8.

V. *Cost of Compliance with BAP Standards*

This part is in response to the affidavit of Miles Kulukundis, of London and Overseas Freighters, and the Declaration of Richard Du Moulin of Marine Transport Lines (MTL), Inc. In paragraph 11 of Mr. Kulukundis' affidavit, he states that London Overseas has spent approximately $12,000 to develop, file, and maintain a best achievable protection plan under ch. 317-21 WAC, and that as requirements are phased in, the expenses for compliance are ongoing and will be substantial. It is important that we put these costs into perspective.

The cost to provide escort vessels for one tanker-one transit, in Washington, more than exceeds the $12,000 which London and Overseas Freighters spent to develop their entire prevention plan. In addition, the pilotage fees for the same tanker, if it were over 50,000 gross tons, would be approximately $10,000 or $5,000 each way. If the tanker were under 50,000 gross tons, the pilotage fees would amount to approximately $5,000--about $2,500 each way.

Mr. Kulukundis' statement is true that the expenses for compliance will be phased in. However, most of the BAP standards will be reflected in international regulation by 1998 and the company will have to spend this money to be in compliance with international and federal regulations by that time. Washington hopes that all the BAP standards will eventually be incorporated into international law and therefore the only expense incurred would be to produce and submit a prevention plan to demonstrate compliance.

It should be noted that the U.S. Coast Guard has no mechanism like prevention plans for evaluating compliance of foreign flag vessels with management practices and personnel policies. The evaluation of a vessel's management and

personnel policies is very difficult in the course of a traditional vessel inspection. The combination used by Washington of a prevention plan submitted by management and an inspection of the vessel to ensure compliance with that plan is much more effective in evaluating management practices, personnel policies and some operating procedures. Hence, the small amount of money required to develop and submit a prevention plan is a great investment when compared to the overall effectiveness of evaluating a company's policies, procedures and practices with respect to prevention.

Mr. Du Moulin states in his declaration that MTL has spent a substantial sum to develop, file, and maintain the chapter 317-21 WAC plan, and that expenses to comply will increase. He then cites an example of the cost of installing one emergency towing arrangement on an MTL tanker at $50,000 for the equipment, plus $30,000 for installation. What he neglects to mention is that this equipment must be installed to be in compliance with the emergency towing requirements in the Safety of Life at Sea Convention. The costs to install this equipment are not solely attributable to the state of Washington, but to the overall implementation of preventative measures at the international, federal, and state level. In fact, by installing the emergency towing equipment in 1996 that will become required in 1998, MTL may well save money considering the rate of inflation of shipyard work over the next two years.

In summary, the cost to develop a prevention plan demonstrating compliance with best achievable protection standards is very modest when compared to the operating cost of a tanker, and in fact is less than the cost to escort one tanker through Puget Sound. In addition, companies will be required to make changes to their operating procedures, management practices, personnel policies, and technology by

1998 in order to come into compliance with the International Safety Management Code and the 1995 Amendments to the Standards of Training Certification and Watchkeeping Convention which will become effective in 1997. The state has imposed very few additional costs that will not be required by the international regime within the next two years.

/s/ Stanley J. Norman
STANLEY J. NORMAN

Signed or attested before me, *Beverly J. Jolley*, by *Stanley J. Norman*.

DATED this 2nd day of July, 1996.

/s/ Beverly J. Jolley
NOTARY PUBLIC, in and for the State of Washington.
My commission expires on: 12/21/97.

EXHIBIT 1

U.S. Department of Transportation

United States Coast Guard

Commandant
U.S. Coast Guard

July 7, 1994

Mr. Stan Norman
Marine Transportation Safety Specialist
Office of Marine Safety
P.O. Box 42407
Olympia, WA 98504-2407

Dear Mr. Norman:

I would like to take this opportunity to pass along my appreciation for your recent presentation in Washington, DC on the Washington State Office of Marine Safety and your proposed "Best Achievable Protection" standards. The U.S. Coast Guard has been and remains committed to protecting all coastal resources in a manner that is responsible to the interests of both the States' and our international obligations. Through shared exchanges such as this, we can both further create solutions to our mutual goals and prevent potential barriers and duplicative requirements.

Again, many thanks for your excellent presentation. I look forward to continuing cooperative efforts not only with the staff in Headquarters, but mots importantly, also with Admiral John Lockwood's staff in the Thirteenth Coast Guard District in Seattle.

Sincerely,

/s/ B.G. Basel

B.G. BASEL
Captain, U.S. Coast Guard
By direction of the Commandant

EXHIBIT 2

MEMORANDUM OF AGREEMENT
ON
OIL POLLUTION PREVENTION AND RESPONSE
BETWEEN
THE THIRTEENTH COAST GUARD DISTRICT
AND
THE STATE OF WASHINGTON

WHEREAS, the United States Coast Guard and the State of Washington share a common interest and responsibility for protecting the waters of Washington and have determined that cooperation in prevention and response to oil spills has permitted the State and the Coast Guard to leverage available resources which in turn has led to better protection of the environment; and

WHEREAS, the United States Coast Guard and the State of Washington find efficiency in government is important to the public they serve and that entering into a Memorandum of Agreement (MOA) that builds upon present close working relationships and identifies areas for expanded interaction will lead to increased protection for the waters of Washington; and

WHEREAS, Congress enacted the Oil Pollution Act of 1990 (OPA 90) and other Federal laws to protect the waters of the United States from oil pollution and to plan for effective and immediate response in the event of an oil spill, and the President subsequently designated the Coast Guard as the Federal On Scene Coordinator (FOSC) within the Washington coastal zone; and

WHEREAS, the State of Washington (hereinafter "the State") has enacted The Oil and Hazardous Substance Spill Prevention and Response Act of 1991 and other State laws to

protect the waters of the State from oil pollution and to plan for effective and immediate response in the event of an oil spill and to augment the State's statutory authority for the prevention and response to spills in waters of the State; and

WHEREAS, both the Thirteenth Coast Guard District (hereinafter "the Coast Guard" except where the context indicates otherwise) and the State recognize the critical roles each has to perform in preventing oil spills, in planning for and responding to oil spills, and in enforcing their respective environmental laws within the waters of the State; and

WHEREAS, the Parties recognize that coordination and cooperation between them in the implementation and exercise of their respective statutory and regulatory authority is essential to avoid conflict and unnecessary duplication and provide the maximum protection to the environment through both prevention and response activities; and

WHEREAS, the Parties desire to act in a cooperative and coordinated manner to protect the waters of the State from actual or threatened oil pollution and to prepare for an effective and immediate response in the event of an oil spill; and

WHEREAS, oil spills require a rapid, efficient, and coordinated response and cleanup from Federal, State, and local agencies, as well as from responsible parties and private entities to minimize the effects on human, wildlife, and other natural resources; and

WHEREAS, the Commander, Thirteenth Coast Guard District, is the senior Coast Guard officer in an area that includes the State, exercising Federal authority under the Oil Pollution Act of 1990, and other Federal laws with respect to oil pollution prevention and response within State waters; and

WHEREAS, the Governor of the State of Washington is the senior State official exercising authority over those State agencies which have responsibilities under State law for oil pollution prevention and response within State waters as described in Appendix A of this Agreement; and

NOW THEREFORE, the Parties agree, to the extent permitted by law, policy and available resources, to cooperate and to coordinate their efforts in implementing and exercising their respective statutory and regulatory duties related to oil spill prevention and response.

I

PARTIES

The Parties to this Agreement are the Thirteenth Coast Guard District and the States of Washington.

II

PURPOSE OF THE AGREEMENT

A. The purpose of this Memorandum of Agreement (MOA) is to ensure that the Parties exercise their respective authorities regarding oil spill prevention and response in a cooperative and coordinated manner so as to avoid unnecessary duplication and conflict and to ensure the best achievable protection from the impact of pollution incidents within the waters subject to the jurisdiction of the United States which are within or may impact the waters of the State of Washington.

B. The Parties recognize that differences of opinion may exist and arise from time to time as to the extent to which Federal law may preempt the State from enacting regulations involving the transport of oil in State waters. However, it is not the intent of this Agreement to settle, or address in any

manner, the legal or jurisdictional differences which may arise between the Parties. It is the intent of the Parties to reserve such issues for resolution outside this Agreement. Of greater importance is the clear agreement by the Parties that the protection of State waters is of the highest priority and the recognition that they musPt act in a cooperative and coordinated manner if effective prevention and response efforts are to occur. To that end, this Agreement is intended to provide a means by which the Parties establish an ongoing, working-level prevention and response relationship.

III

DEFINITIONS

A. Except where otherwise specifically defined in the context of its use herein or where specifically set forth below, terms used in this Agreement shall have the meaning as set forth in applicable Federal and State law.

B. The term "State waters" (or "waters of the State") shall mean those navigable waters of the United States which lie within the jurisdiction of the State of Washington and over which the Coast Guard has concurrent Federal authority for oil spill prevention and response.

C. The term "vessel(s)" when used in this Agreement shall mean all tank vessels and tank barges and all commercial vessel(s) of 300 gross tons or more, including both United States and foreign flag. This definition is not intended to limit actions of the Parties under this Agreement relative to smaller vessels where such actions are clearly appropriate or required under applicable statute to ensure the protection of the waters of the State from pollution.

IV

INFORMATION SHARING

The exchange of information between the parties relative to pollution events and risks is necessary to develop appropriate prevention and response systems. Both Parties maintain information systems that are relevant to both historical and real-time incidents. The Parties will seek to encourage the fullest degree of information sharing from available and pertinent data bases in order to make accurate and timely decisions to prevent and/or respond to oil pollution. Transmissions of information shall be in accordance with procedures adopted by the Parties for that purpose.

A. Action:

1. The Parties agree, subject to limitations imposed by applicable law and regulation, to share information from relevant studies.

2. The Parties will advise each other as soon as possible of information they receive of the following events occurring in the navigable waters, or that may impact the State, involving vessels: disablings, collisions, groundings, explosions, rammings, allisions, distressed vessels and other events which may significantly increase the potential for an unauthorized discharge or create an unusual or acceptable risk to public health and safety, or the safety of navigation within State waters.

3. The Parties will inform each other as soon as possible of any situation or circumstance relative to facilities whose operation or equipment may significantly increase the potential for an unauthorized discharge or create an unusual or unacceptable risk to public health and safety, or the safety of navigation within State waters.

4. The Parties agree to identify and share existing data bases and work toward developing risk management programs that provide risk data sharing for vessels and access by both parties to all data, subject to the requirements of applicable law, regulations, and policy, in a manner to conserve and leverage agency resources.

V

OIL SPILL RESPONSE PREPAREDNESS

A. Planning Documents

1. National Oil and Hazardous Substances Pollution Contingency Plan ("National Contingency Plan – NCP"):

a. The National Contingency Plan establishes the response organization within the United States and requires tiered contingency planning efforts. The Environmental Protection Agency (EPA) is the lead agency in drafting the NCP. The Coast Guard and EPA are jointly responsible for implementing the NCP. The NCP governs actions concerning spill response and cleanup for Federal, State, and local agencies, responsible parties, cleanup contractors, and others participating in such actions in United States waters.

b. The State will work with the Coast Guard to ensure State plans and policies are consistent with the NCP.

2. International Coordination

Subject to the restrictions of applicable law, regulation and policy, the Coast Guard agrees to provide information to the State concerning agreements, plans and operating procedures developed to coordinate pollution prevention and response efforts with Canada.

3. Statewide Master Oil and Hazardous Substance Spill Prevention and Contingency Plan

The State has developed and maintains the Statewide Contingency Plan that details State responsibilities, policies, and actions governing response to and cleanup of spills in waters of the State.

4. Northwest Area Contingency Plan

a. The Area Committees established under OPA 90 are responsible for the development of Area Contingency Plans which describe how Federal, State, and local agencies, as well as owners and operators, cooperatively respond to oil spills. The Area Committee also coordinates the scheduling of oil spill exercises in the Pacific Northwest. The Coast Guard Predesignated Federal On-Scene Coordinators (FOSC) are the chairs of the Coastal Area Committees in their respective areas of responsibilities. The State is the vice chair of the Coastal Area Committee. The Area Committees have created a single "Northwest Area Contingency Plan" which serves as the Area Plan for each of the areas in the State (coastal and inland).

b. The State has merged the State Contingency Plan with the Northwest Area Contingency Plan to coordinate ongoing planning efforts and create consistency between the local, State, and National Contingency Plans. In essence, there is "one" plan in the event of an oil spill within the State of Washington.

c. Geographic Response Plans are specific operational plans which identify and describe specific priorities and methods to protect specific regional environmental areas. These plans are prepared jointly by the Coast Guard and the State with the input of other resource agencies, response contractors, citizen groups, Indian tribes, and oil industry representatives. They are included as appendices to the Area Contingency Plan (and therefore the

State Contingency Plan), and may be referenced as part of facility and vessel contingency plans.

5. Vessel Prevention Plans

a. The State requires tank vessels and tank barges operating in State waters to file an oil spill prevention plan that provides the best achievable protection for the waters of the State.

b. Both Parties agree to work together and advise each other of any aspects of implementing their respective oil spill prevention plan programs which might impact on the other Party's oil spill prevention programs.

6. Vessel Response Plans

a. The State requires tank vessels and certain cargo and passenger vessels operating in State waters to file a contingency plan that demonstrates that the vessel will provide, to the maximum extent practicable, the highest protection from damages caused by the discharge of oil into the waters of the State and for the containment and cleanup of oil spills from the vessel into the waters of the State.

b. At the National level the Cost Guard is responsible for developing Federal standards for reviewing and approving tank vessel oil spill response plans required by Federal law. Such plans are reviewed and approved at Coast Guard Headquarters in Washington, D.C.

7. Facility Prevention Plans

a. The State requires facilities to have an oil spill prevention plan that demonstrates that the facility will provide the best achievable protection from damages caused by the discharge of oil into the waters of the State.

b. Both Parties agree to work together and advise each other of any aspects of implementing their respective facility oil spill prevention plan programs which might impact on the other Party's prevention and response programs.

8. Facility Response Plans

a. The State requires facilities to file a contingency plan that will demonstrate that the facility will provide, to the maximum extent practicable, the best achievable protection from damages caused by the discharge of oil into the waters of the State and for the containment and cleanup of oil spills from the facility into the waters of the State.

b. The Coast Guard is responsible for developing standards for reviewing and approving facility oil spill response plans as provided by Federal law.

c. Recognizing the limitations expressed in Paragraph X, the Parties agree to cooperate to the maximum extent possible in the development of requirements for facility response plans with the long-term objective of providing facilities with a single plan review and approval process. In the interim, the Parties will cooperate to ensure plan requirements are compatible and do not conflict. Either Party may, at its option, accept the review of the facility response plans by the other Party (subject to periodic oversight) where procedures to account for any differences between the State and Federal requirements have been mutually agreed upon.

9. Regional Marine Safety Plans

a. Regional Marine Safety Plans developed by Regional Marine Safety Committees appointed by the State contain recommendations for improvements to safe marine transportation in regional waters of Washington State.

b. The State seeks implementation of the plans through State and Federal actions. The Coast Guard agrees to consider plan recommendations in developing Federal programs.

B. Government Committees

1. *States/BC Oil Spill Task Force.* The State is a member of the States/BC Oil Spill Task Force. The Coast Guard, while not a member of the Task Force, attends meetings, engages in information exchange and provides input as appropriate.

2. *Regional Response Team.* The National Contingency Plan (NCP) directs the organization of government committees to prevent and respond to pollution emergencies. The Region X Regional Response Team (RRT) is established as a coordinating committee by the NCP and includes the State, along with the Federal agencies with pollution response responsibilities. The Parties agree to jointly participate as members of the RRT in regularly scheduled meetings, assisting the Federal and State OSCs during spill events, and coordinating with the Area Committees in contingency planning efforts.

3. *Joint Response Team.* The Canada-United States Joint Marine Pollution Contingency Plan (CANUS Plan) establishes the Joint Response Team (JRT) to function as an advisory team activated in the event of a spill covered by the CANUS Plan. The membership of the JRT is essentially the same as the RRT with Canadian equivalents added. The Parties agree to support the JRT in the same way they support the RRT. Activation of the JRT will not affect the State's role in managing the response under a unified command.

4. *Washington State Natural Resource Damage Assessment Team (NRDA).* This team consists of state and

Federal resource agents and Tribes. The Team provides unified and coordinated natural resource recommendations to the unified command, coordinates natural resource damage assessments, and has the lead in determining natural resource protection strategies.

5. The Parties agree to coordinate local response planning by jointly participating in the Area Committee planning process. Both Parties are strongly committed to participating in Northwest Area Contingency Plan development and the use of the Northwest Area Committee to coordinate exercises and drills, consistent with the provisions of the NCP.

VI

PREVENTION OF OIL SPILLS

A. The Parties agree to cooperate in the execution of their respective regulatory prevention responsibilities, to minimize duplication of effort, and seek to identify opportunities for innovative implementation of casualty prevention programs, wherever possible.

B. Vessel Inspections and Examinations

1. The Parties conduct inspections and examinations to improve pollution prevention and to enforce their respective laws aboard United States and foreign flag vessels operating in State waters. Subject to the recognition that each Party must independently exercise its respective responsibilities in accordance with applicable law, regulations, and policies, the Parties agree to: (a) work together to avoid inconsistent requirements and to coordinate vessel inspections and examinations in such a way that disruption to the industry is minimized and efficiency and pollution prevention maximized; and (b) to make inspection/examination information available

to the other and to cooperatively review inspection/examination results.

2. In administering vessel inspection/examination programs:

a. The Parties will coordinate the scheduling of vessel boardings to the maximum extent practicable. This Agreement does not preclude either Party from scheduling independent boardings as required by their respective policies.

b. The Parties agree to promptly inform each other of violations or potential violations of Federal and State law that could result in a marine casualty or lead to a pollution incident.

c. The Parties agree to promptly inform each other of any situation or circumstance they may discover relative to a vessel's condition, equipment or crew that may increase the potential for an unauthorized discharge or create an unusual or an unacceptable risk to the public health and safety, or the safety of navigation within State waters.

C. Identification of High Priority Vessels

The Parties have authority (under their respective Federal and State laws) to regulate the entry of vessels, including those determined to be a threat to the environment. Both Parties have developed criteria aimed at identifying high priority vessels for boarding. Both Parties agree to share information on such vessel boardings to the maximum extent practicable, and when either Party determines that a vessel or vessels pose such a threat to the environment, that determination will be forwarded to the other Party. The Parties will consider available information in taking action as appropriate under applicable law.

D. Tank Vessel Manning

1. The Parties agree to cooperate and coordinate in evaluating manning, training, and qualification requirements.

2. The Parties agree to share the progress and results of their research into human factors that cause marine casualties. The Parties agree to actively promote and coordinate research projects to identify those human factors that cause pollution incidents.

E. Vessel Transfer Operations

1. Recognizing that bunkering and refueling operations account for the most chronic vessel oil pollution in State waters, the Parties agree that they will cooperatively monitor transfer operations aboard vessels and advise the other Party of violations observed, make transfer monitor records jointly available and cooperatively review monitoring results.

2. The Parties agree to consider and share other available information to initiate improved strategies aimed at supplementing those presently employed to reduce the risk of these spills.

F. Waterways Management

1. Vessel Traffic Systems

a. The United States Coast Guard under the Ports and Waterways Safety Act is authorized to construct, operate, maintain, improve or expand Vessel Traffic Services (VTS) within ports to increase navigational safety and protect the marine environment, by reducing the risk of collision or grounding.

b. Subject to applicable Federal law, regulations and policies, the Parties agree to share information relevant to vessel traffic management issues and to work closely with

each other in determining the best way to manage vessel traffic in State waters.

2. Aids to Navigation

Federal law authorizes the Coast Guard to establish, regulate, and maintain a uniform system of aids to navigation throughout the United States. The State agrees to assist the Coast Guard in identifying recommended changes or improvements, to the system of navigational aids within the water of the State.

G. Facility Inspections

1. Both Parties regulate and inspect oil transfer facilities and their operation within the State to ensure compliance with pollution prevention and pollution response regulations. To improve safety and conserve resources, the Parties agree:

a. To coordinate their respective inspection and monitoring activities to the extent practicable to utilize the resources of both Parties efficiently and effectively, and to minimize the disruption of the facility inspected; and

b. To coordinate in the enforcement of requirements for trained and qualified personnel to be responsible for transfer operations at waterfront facilities; and

c. To work together to encourage the development of adequate facilities to receive oily wastes from vessels.

H. Public Information and Education

1. The Parties agree that public education in areas of pollution prevention and safety is a high priority and each Party should seek to maximize opportunities to coordinate oil pollution prevention, public awareness, and education programs.

2. The Parties agree to cooperate in the development and implementation of public information and education for all areas in which the Parties share statutory responsibilities.

VII

RESPONSE

A. Unified Command

1. Response to marine oil spills in the State will be managed by the Parties using the Incident Command System (ICS) as defined in the Area Plan through which decisions will be made by consensus, whenever possible. The Parties agree to establish and staff a joint command post to expedite consensus decision-making. As provided in Federal law and subsequent delegations, the FOSC is required to direct all Federal, State and private actions in response to spills or threats of spills which are a substantial threat to the public health or welfare. Should a disagreement occur over an issue which is not specifically delegated to the State by Federal law, the Coast Guard OSC shall have final decision-making authority after advising the State OSC of that decision.

2. The Parties agree to use the Unified Command for all relevant decisions during oil spills.

3. Participation in the Unified Command does not mean that the Parties are relinquishing or surrendering their authority, including the right of the State to establish more stringent cleanup criteria under State law.

4. The Coast Guard OSC (FOSC) will coordinate with the State OSC through the Unified Command on all significant issues affecting the management of the spill from the control of oil loss during the initial stages of the incident through the final Federally directed cleanup.

B. Notification

Both Parties agree to provide to each other the earliest possible notification of discharges of oil and imminent threats of such discharge as provided in the applicable Area Plan.

C. Environmental Protection

1. Both Parties recognize the importance of protecting and preserving natural resources in responding to an oil spill event. Response strategies and procedures established by the ICS Planning Division, including the NRDA Team, and the Geographic Response Plans will be used by the OSCs in the Unified Command as the primary guidance in making resource protection decisions.

2. The Coast Guard agrees to involve the State in vessel salvage, lightering, safe haven and related decision-making to the extent such decisions may affect the release of spilled oil, its containment or its cleanup. The FOSC retains final authority for such decisions.

3. The Coast Guard agrees to recognize the agency designated by the State as the State designated lead in coordination with the appropriate Federal agencies to organize and manage wildlife rescue and rehabilitation, and wildlife volunteer management efforts, through the Unified Command.

D. Joint Information Center

The Parties agree to establish within the Unified Command a Joint Information Center (JIC) to provide for the coordinated dissemination of information. This does not preclude the Parties from making independent responses to the media and public.

E. Drills and Exercises

1. Drills and exercises are required by both Parties to ensure the readiness and coordination of pollution response organizations. It is the intention of the Parties to encourage coordination and participation in the periodic drills and exercises to facilitate a better understanding of each party's duties and responsibilities as well as to ensure a coordinated, effective working relationship at oil spill incidents. The parties agree to jointly evaluate drills and exercises and recommend or require changes to plans, equipment or organizations as appropriate.

2. The Parties agree to coordinate the planning, design, conduct, and evaluation of exercises to the extent possible under applicable laws, regulations, and policies. The Parties agree to use Northwest Area Committee work groups for large drill scheduling purposes.

F. Response Monitoring and Technology

1. The Parties agree that methods used to clean up oil and oily debris shall whenever possible be established through the Unified Command in order to decide the level of action required by the responsible party, and may decide to either direct cleanup operations through the responsible party or to assume responsibility for the cleanup operation.

2. The Parties agree, through the Unified Command, to provide timely input and recommendations on dispersant usage, in situ burning, bioremediation, other non-mechanical response technologies and the discontinuance of cleanup operations and demobilization of response activities. The State retains the authority to undertake remedial or mitigating actions beyond the response actions required by the National Contingency Plan.

G. Tank Vessel Response Equipment Standards

Coast Guard Headquarters has established tank vessel response equipment requirements and is responsible for maintaining and updating those requirements. The State is authorized by State law to adopt rules including standards for spill response equipment to be maintained on tank vessels operating State waters.

VIII

NATIONAL POLLUTION FUND CENTER INFORMATION

A. The Oil Spill Liability Trust Fund (The Fund):

The Fund provides Federal funding under certain conditions for oil discharge removal actions. The Fund is available in certain circumstances to compensate the State for incurred costs and damages associated with oil discharges. To the extent allowed, a state may access The Fund under currently published regulations and National Pollution Fund Center (NPFC) procedures.

B. The National Pollution Fund Center (NPFC):

1. The National Pollution Fund Center (NPFC) administers the Oil Spill Liability Trust Fund (The Fund) in order to: provide State access to The Fund, conduct cost recovery, accept and process claims, and evaluate requests by Federal trustees to fund initiation of the assessment of natural resource damages. The NPFC also administers Certificates of Financial Responsibility and provides CERCLA/Superfund funding to Coast Guard On Scene Coordinators (FOSC) responding to hazardous substances incidents.

2. The State may receive payment from The Fund in the State's role as a response organization engaged in removal

activities consistent with the National Contingency Plan, as appropriate claimant for damages, and in the State's role as a natural resource trustee.

a. Action:

(i) The State may negotiate directly with the NPFC to establish a cooperative agreement to provide access to The fund under Section 1012(d)(2) of the Oil Pollution Act of 1990 (OPA 90). Any agreement between the State of Washington and the National Pollution Fund Center shall be attached as an annex to this MOA.

(ii) The NPFC, upon request of the Governor of Washington and as authorized by the Federal On Scene Coordinator (FOSC), may obligate The Fund for payment in an amount not to exceed $250,000 for removal costs, consistent with the National Contingency Plan (NCP), required for the immediate removal of a discharge, or the mitigation or prevention of a substantial threat of a discharge of oil. The NPFC's Technical Operating Procedures (TOPS) for State access under Section 1012(d)(1) of OPA 90, and the TOPS for resource documentation under OPA 90 are approved guidelines for State use to access The Fund under this section.

(iii) Claims. The Fund may be used for the payment of State claims for uncompensated removal costs determined by the Coast Guard pursuant to the procedures found in 33 CFR Part 136.

(iv) When the State works directly in support of the Federal On Scene Coordinator (FOSC) in performing removal actions, a Pollution Removal Funding authorization (PRFA) may be provided to the State to establish a contractual relationship and to obligate The Fund.

(v) Natural Resource Damage Assessments. The State's designated Natural Resource Trustee may request access to The Fund for the initiation of an assessment of natural resource damages resulting from a discharge of oil, through a Federal Lead Administrative Trustee in accordance with the procedures established by the NPFC (Section 6002(b) of OPA 90).

IX

ENFORCEMENT

A. Although enforcement action undertaken by each Party must occur independently, the Parties agree to consult with each other as to intended enforcement action relating to pollution cases or incidents which have the potential to cause pollution.

B. Subject to the requirements and limitations of applicable laws, regulations and policies, the Parties agree to coordinate investigations and enforcement actions involving oil spills or marine casualties which have the potential to cause oil spills, including the sharing of pertinent information regarding witnesses, reports, and other available information that may assist in determining the cause of the oil spill or casualty.

C. When the Parties become aware of apparent violations of the other party's laws and regulations, they agree to notify the other Party.

X

RULE-MAKING

A. The Oil Pollution Act of 1990 and other Federal laws provide for the issuance of regulations pertaining to the prevention of oil spills from vessels. The Commandant of the Coast Guard has the authority to promulgate such regulations.

The Commander, Thirteenth Coast Guard District and the respective Captains of the Port, have limited authority to promulgate local regulations.

B. Acting under its statutory and regulatory authority, the State has the authority to promulgate regulations concerning oil spill prevention and response that are not preempted by Federal law. The Parties agree to maintain close communication to reduce conflict between each Party's regulations.

C. The intent of this section is to avoid conflict and inconsistent regulation in rule-making wherever possible and to endeavor to provide a coordinated response to oil pollution prevention and response. Recognizing that both Parties must follow strict procedures with respect to public notice and comment in rule-making, the Parties agree that, in the process of issuing rules regarding the prevention of and response to oil spills, they will consider the existence of the other Party's existing rules on the subject.

XI

RELATION TO FEDERAL AND STATE LAW

Nothing in this Agreement is intended to, nor shall operate to, preempt Federal or State law. Any actions taken under this Agreement shall be consistent with, and may be limited by, applicable law, regulations and policies.

XII

MISCELLANEOUS

A. This Agreement represents a voluntary understanding between the Thirteenth Coast Guard District and the State of Washington.

B. The terms of this Agreement may be changed at any time by the Parties by a written, signed amendment hereto with or without notice to any other person.

C. The Agreement may be terminated by written notice of either Party at any time without notice to any person other than the other Party.

D. No action based upon this Agreement may be brought against the United States or the State of Washington by any person, or by either Party against the other Party.

E. This Agreement does not alter, modify, abridge, create, or in any way affect any rights, duties, obligations, or liabilities of either Party or any person under the laws of the United States or the State of Washington.

F. The actions called for under this Agreement will be carried out by the Parties as their available resources allow. If either Party is unable to execute any actions called for in this Agreement due to a lack of resources, such inability to act shall not be considered a reasonable effort to overcome the resource shortage.

G. Nothing in this Agreement is intended to delegate the enforcement authorities of either Party to the other. However, it is the common goal of the Parties that through the cooperation described in this Agreement, each Party may conserve resources by using information gathered by the other Party in their respective investigations and enforcement actions subject to applicable laws, regulations and policies.

H. In the event that individual and severable portions of this Agreement are found to be in conflict with either State or Federal law, regulations or policies and therefore of no effect, the Agreement will remain in effect without those provisions

unless either Party notifies the other in writing that the entire Agreement is terminated.

I. Any action to modify, amend, or terminate this Agreement may only be taken by the Governor of the State of Washington or the Commander, Thirteenth Coast Guard District or persons to whom this authority is specifically delegated by them.

J. Provisions of this MOA shall be effective when signed by both parties. This MOA will remain in effect until revised or rescinded by either party by written notice.

FOR THE STATE OF WASHINGTON:	FOR THE UNITED STATES COAST GUARD:
/s/ Mike Lowry MIKE LOWRY, Governor State of Washington	/s/ J.W. Lockwood J. W. LOCKWOOD, Rear Admiral, USCG Commander, Thirteenth Coast Guard District
Date: 24 April 1995	Date: 24 April 1995

APPENDIX A

The following agencies of the State of Washington have responsibilities under State law relating to oil spill prevention and response as described:

Department of Community Development is responsible for the development and implementation of the State's Comprehensive Emergency Management Plan, management of the State's 24-hour emergency notification system and, in the event of an oil spill, will activate of the State's Emergency Operations Center and coordinate recovery efforts on behalf of affected local governments, businesses, and individuals in the State.

Department of Ecology is the designated trustee for natural resources under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), the Oil Pollution Act of 1990 and State law, and is responsible for planning for the prevention of, and response to, facility oil spills, for inspecting facilities to assure compliance with State oil spill prevention and contingency planning requirements, for preparation of the Statewide Master Oil and Hazardous Substance Spill Contingency Plan that establishes the State's framework for response to marine and inland spills, represents all agencies and is the designated State contact for oil spill reports and, acts as the State's On Scene Coordinator (OSC) for responding to all spills of oil and hazardous substances. DOE coordinates the activities of the Washington State Natural Resource Damage Assessment Team. DOE also serves as the vice chair of Coastal Area Committees, represents the State as the State RRT member and is a member of the States/BC Oil Spill Task Force.

Department of Fish and Wildlife is the trustee responsible for the protection and management of the State's fish and wildlife

resources, including the training and managing of volunteers in wildlife planning and rescue efforts and, in the event of an oil spill, will identify sensitive resource areas and habitats, issue Hydraulic Protection Approvals for certain cleanup and restoration activities, rescue and rehabilitate wildlife, identify trust natural resource injuries, and conduct natural resource damage assessment.

Department of Health is responsible for overseeing the safety of the State's shellfish for human consumption.

Department of Natural Resources (an agency responsible to the Commissioner of Public Lands, a constitutionally elected official) is responsible for the management of State-owned aquatic lands and associated habitats and, in the event of an oil spill, will identify trust natural resource injuries, and conduct natural resource damage assessment.

Office of Marine Safety is an oil spill prevention agency and, as such, is responsible for planning for the prevention of vessel oil spills, for implementing regional marine safety plans, for inspecting vessels to assure compliance with State oil spill prevention laws, for establishing standards for and approving vessel oil spill contingency and prevention plans required under State law, and assuring compliance with these plans.

Parks and Recreation Commission is responsible for operating and maintaining State park resources including large upland and marine parks, underwater parks, beaches, boat launches, boat moorages, and, in the event of an oil spill, will conduct natural resource damage assessment.

Natural Resource Damage Assessment Team (NRDA) comprises the Departments of Ecology, Fish and Wildlife, Health, Natural Resources, and the Parks and Recreation Commission and, in the event of an oil spill, will act to give

unified State natural resource recommendations to the State OSC, coordinate natural resource damage assessment, and provide assistance in determining booming and cleanup strategies.

EXHIBIT 3

U.S. Department of Transportation

United States Coast Guard

Commandant
U.S. Coast Guard

May 19, 1993
16455

From: Commandant

To: Commander, Coast Guard District (d)

Subj: COAST GUARD AND STATE MEMORANDUM OF AGREEMENT ON MARINE ENVIRONMENTAL PROTECTION

Ref: (a) COMDT (G-MEP) ltr 16452 dtd 18 Aug 92

1. The Oil Pollution Act of 1990 (OPA 90) specifically affirmed the rights of states to protect their marine environment. In reference (a), the Commandant directed all district commanders to enter into Memoranda of Agreements (MOA) with states to ensure a sound national marine environmental protection policy through joint preparedness, prevention, response, and law enforcement efforts. The MOA should minimize duplicative requirements, leverage resources and eliminate barriers to marine transportation due to differing Federal and state regimes. I will strongly support your creative solutions towards achieving these goals. We must, however, be careful to not appear to be delegating our responsibilities to the states - a cooperative and shared approach must be emphasized.

2. Several states have been extremely pro-active in developing programs that may differ somewhat from our

Coast Guard policies and may exceed our mandates and regulations. OPA 90 dis not preempt states rights, and, in our efforts we must be committed to work together to complement rather than duplicate. Should Federal preemption of a state mandate become necessary, it will become a complex legal issue. For guidance, I have provided a copy of the Chief Counsel's memorandum on the Federal preemption, enclosure (1).

3. I have established a State Liaison Focus Group under the Associate Program Director (G-MI), comprised of members from each marine safety program, enclosure (2), to assist you in developing MOA's with your states. They have developed a concept paper, enclosure (3), and a generic MOA, enclosure (4), to help expedite the process. Attached to the generic MOA is an Annex provided by the National Pollution Funds Center (NPFC) on funding and trustees issues. Should you desire to alter the provided wording, or add additional information into the body of the MOA, please contact the NPFC focus group representative.

4. As the MOA process evolves and states expand their environmental roles, different states can be expected to have varying positions on like issues for a wide variety of reasons. Provides broad guidance on the full range of issues that should provide sufficient direction for negotiation with the states. Please feel free to contact the cognizant program manager, or appropriate focus group representative to discuss specific issues. For any issues which may have broad program impact or may require policy guidance, I request that it be forwarded to the focus group coordinator for program evaluation, decision and dissemination to all districts. Attachment 3 to the concept paper provides a format that we have found helpful for thinking through specific issues.

5. State bills and regulations can often progress at a much more rapid pace than in the federal system. To help you stay on the leading edge of state issues, I have accessed a computerized system which tracks state legal initiatives. This system, "STATENET", can provide current status and summary of the approximately 140,000 states' bills per year based on specific word topic and state searches. Enclosure (5) provides a summary, listing of key topics as an example of the system's output. A state by state synopsis with the appropriate STATENET information will be disseminated to each of you shortly. I welcome your input to expand the list to meet your needs and plan to provide you with direct access to the system in the very near future.

6. I encourage you to press forward smartly and build on the cooperative momentum that has already been placed in motion by many of our state counterparts. We must also continue to ensure that both our Federal and state interests and resources are available to work together for the common purpose of protecting the marine environment.

/s/ A.E. Henn

A.E. HENN
Chief, Office of Marine Safety,
Security and Environmental Protection

Encl: (1) G-LMI Preemption Memo dtd 30 Jan 91
(2) State Liaison Focus Group Members
(3) Concept Paper
(4) Generic MOA
(5) STATENET Summary, Topic List, Sample

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR

CAUSE NO. C95-1096

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,

v.

MIKE LOWRY, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MCEACHRAN, Prosecutor of Whatcom County; DAVID NEEDY, Prosecutor of Skagit County; JAMES KRIDER, Prosecutor of Snohomish County; and NORMAN MALENG, Prosecutor of King County,
Defendants,

and

THE WASHINGTON ENVIRONMENTAL COUNCIL; THE NATURAL RESOURCES DEFENSE COUNCIL; and OCEAN ADVOCATES, INC.,
Intervenors.

DECLARATION OF WILLIAM BAFUS

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, William Bafus, being first duly sworn on oath, depose and state as follows:

1. I am an Environmental Planner for the State of Washington Department of Ecology. I have for worked for the department 16.5 years. I have held the position of Environmental Planner for 16.5 years. Within the Economic and Regulatory Research Section, I conduct economic analyses (Small Business Economic Impact, general economic impact, benefit/cost) on agency rule proposals and policy initiatives. I also collect and analyze economic and other related data, as well as provide financial and statistical analysis and forecasts as needed. I also analyze legislation affecting my work unit and the agency.

Jobs outside Department of Ecology include work with the Washington State Pollution Liability Insurance Agency as an economic and financial analyst for 13 months. In 1987, for three years, I also worked at the Washington State Senate, Committee on Ways and Means as a fiscal analyst with responsibility for taxation and revenue analysis. In 1973, for three years, I worked at the Washington State Office of Program Planning and Fiscal Management, State Planning Division doing socio-economic analysis and planning process administration. In 1968, for five years, I worked at the University of Puget Sound as an Assistant Professor of Economics.

2. My educational background is as follows: Willamette University, A.B. in Economics, 1964; Purdue University, M.S. in Economics and completion of non-thesis requirements for PhD, 1968.

3. The charts attached as Exhibits 1 and 2 are derived from data collected during the development of a facility financial responsibility rule as required in Section 704 of Chapter 200, Laws of 1991 (Oil Spill Prevention and

Response Act). The rule development and the Small Business Economic Impact Statement required information about cleanup costs for releases of oil.

4. Information about actual oil spills occurring over the period from approximately mid-1980's through 1993 was gathered from Department of Ecology records, U.S. Coast Guard records, and published sources (U.S. EPA, State of California, etc.) Cleanup cost information was obtained to the extent necessary through telephone and other contacts with involved entities. The data was collected and analyzed in order to develop formulae for facility financial responsibility rule requirements for various classes of oil or oil product-producing and oil-handling facilities. Ecology sought to determine whether the rule had disproportionate impacts on small business.

5. Table A entitled "Actual Cost of An Oil Spill Cleanup by Number of Barrels and Type of Oil" shows data for total cleanup cost, in 1993 dollars. The data set is from the spills and releases in the data set described in paragraph 4. The information for the type of oil is broken into the categories of: all spills (whatever the type of oil, either "heavy" or "light"); for spills involving crude oil or "heavy" petroleum products (heavy bunker fuel, asphalt, etc.); and for spills involving "light" petroleum products (gasoline, diesel, aviation gas, etc.) In each case, the data is separated into the number of barrels spilled. The second column is the number of cases involved in a certain number of barrels spilled. The third and fourth columns show the minimum and maximum total cleanup costs reported for spills in each of the categories are shown. The last column shows the average of the total clean up costs for all the spills within each size category.

6. In Table A, for example, for heavy oil, such as that carried by tankers, a low cost for clean up of 101 to 1000

barrels spilled would be $5,920 and the high cost would be $5,000,000. The average costs to clean up this number of barrels would be $685,777.

7. Table B entitled "Average Cleanup Costs per Barrel of Oil" describes the average costs per barrel to cleanup an oil spill. Table B gives the same information as Table A, except that the cost information is shown on a *per barrel* basis. Table B provides a different perspective on the same information set.

8. In Table B, for example, for heavy oil, such as that carried by tankers, the low cost per barrel of oil to clean up a spill of 101 to 1000 barrels is $30 per barrel. This high cost is $9,130, while the average cost per barrel to clean up such a spill is $1,360.

9. I reviewed the affidavit of C. Jonathan Neel, which discussed five incidents in Washington waters. One of the incidents, *Matzukaze* was a grounding with no spill, and was not considered by me. Four of the incidents resulted in an average size spill of heavy oil products of 185,000 gallons or 4,405 barrels.

10. Using the data cited in Table B included with my declaration, the per-barrel cleanup costs for a spill of this size and type of product under average conditions would be $1,428. Multiplying this value by 4,405 barrels results in an estimated total cleanup cost of approximately $6.3 million in 1993 dollars.

11. I use the term "average conditions" because actual cleanup costs incurred for any of the spills individually or for all of them collectively may differ from average values due to the presence or absence of sensitive or especially valuable environmental resources, weather conditions, tidal conditions, or any number of other environmental factors. The costs

described in paragraph 3 do not include any resource damages or oil spill penalties.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of July, 1996.

/s/ William Bafus
WILLIAM BAFUS

TABLE A

Actual Cost of An Oil Spill Cleanup
By Number of Barrels and Type of Oil

All Spills

Barrels Spilled	Number of Cases	Low Cost	High Cost	Average
0 to 1	17	$39	$10,320	$2,042
1.1 to 10	12	$500	$100,000	$12,961
11 to 100	10	$558	$300,000	$52,626
101 to 1000	10	$5,920	$5,000,000	$1,085,421
1001 to 91000	19	$126,807	$35,000,000	$7,823,165

Heavy Oil

Barrels Spilled	Number of Cases	Low Cost	High Cost	Average
0 to 1	14	$39	$10,320	$2,397
1.1 to 10	6	$500	$100,000	$5,701
11 to 100	9	$558	$300,000	$53,540
101 to 1000	8	$5,920	$5,000,000	$685,777
1001 to 91000	13	$320,880	$35,000,000	$8,715,443

Light Oil

Barrels Spilled	Number of Cases	Low Cost	High Cost	Average
0 to 1	3	$100	$635	$389
1.1 to 10	6	$2,381	$100,000	$20,221
11 to 100	1	Only one case		$44,400
101 to 1000	2	$368,000	$5,000,000	$2,684,000
1001 to 91000	6	$126,807	$19,080,000	$5,889,896

Department of Transportation

United States Coast Guard

August 18, 1992

From: Commandant
To: Commander, Eleventh Coast Guard District (d)

Subj: STATE COORDINATION FOR OPA 90 IMPLEMENTATION

1. The Oil Pollution Act of 1990 (OPA 90) has been with us for over two years now. The Act materially altered the nature of the relationship between the Coast Guard and the states in the marine environmental protection (MEP) arena. States now have the opportunity for a more active role in pollution prevention, response, access to the Oil Spill Liability Trust Fund (the Fund), and freedom to regulate in areas historically reserved to federal agencies. As the Coast Guard works toward implementing the provisions of this Act, we see many states also developing their own pollution prevention and response regimes, as well as promulgating related legislation and regulations. With the states so actively involved in pollution initiatives, it becomes imperative that the Coast Guard and states coordinate our activities to ensure a maximum measure of consistency.

2. As I've discussed with you in the past, successful implementation of OPA 90 requires a close working relationship with each state. Where no relationship now exists, I want you to initiate one. Where one does exist, I want you to foster it and have it evolve into a mutual alliance for managing the full range of MEP issues. I believe that you, as District Commander, with the assistance of the Regional Response Teams (RRT), are best situated to take the lead in

establishing and nurturing this relationship. My plan is to have each district commander serve as the focal point for Coast Guard/state coordination, with input received from their captains of the ports, Headquarters, the National Pollution Funds Center (NPFC), and the National Strike Force Coordination Center (NSFCC).

3. A key result I want from this coordination effort is a single comprehensive memorandum of agreement (MCA) between you and each state (and/or Territory or Possession, etc.) in your District. I envision one MOA with each state, so in instances where state boundaries are part of two or more districts, it will be important to work together to develop a multi-district/state MOA. When an MOA incorporates more than one district, I want each district commander involved to be signatory to it. The MOA should set forth the Coast Guard/state relationship in MEP activities including planning, prevention, response, and state access to the fund. Commandant (G-M) and the NPFC will provide guidance and assistance in developing these agreements. A concept paper defining the Coast Guard's state coordination initiative is being developed and should be available by 1 October 1992. This concept paper will include a conceptual MOA to be used as a basis for your negotiations with each state in your district.

4. Your initial contact with the governor should seek designation of a single point of contact within the state government, to the extent possible, who can represent the governor and oversee developing the comprehensive agreement described above. Where it may not be possible, or not to our advantage to have a single point of contact, we will likely have to negotiate the MOA with multiple state agencies. The designee(s) should be able to direct our staff elements to their appropriate state counterparts. Ideally, we would

propose this designee be the state representative to the RRT, and I would expect you to offer your RRT representative, with the assistance of the newly formed district response advisory teams, as your point of contact.

5. Enclosure (1) is a letter that I suggest you use to make the initial contact with the governors. I would like you to stay with this text as much as possible so that the letters remain consistent throughout the districts. The bracketed text in the third paragraph may be omitted as appropriate. If you are aware of any of the governors having already designated a point of contact for state coordination, you should use the wording of option (a) of paragraph five of enclosure (1) when sending the letter. If you are not aware of the governor's designation of a point of contact, option (b) should be used.

6. Commander Bruce Russell, Chief of the Environmental Coordination Branch (G-MEP-3) will be my primary point of contact. He may be reached at (202) 267-0149. Captain Richard Wright, Chief of the Policy and Coordination Division, National Pollution Funds Center (CP) will also be coordinating our relationship with the states. He may be reached at (703) 235-4712.

/s/ J.W. Kime

J. W. KIME
Admiral, U.S. Coast Guard
COMMANDANT

Encl: (1) Sample Letter to State Governor

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Honorable John C. Coughenour

NO. C95-1096C

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,

v.

MIKE LOWRY, Governor of the State of Washington, et al.,
Defendants,

and

THE WASHINGTON ENVIRONMENTAL COUNCIL;
THE NATURAL RESOURCES DEFENSE COUNCIL,
Intervenors.

DECLARATION OF JEFFREY NEEDLE
IN REPLY TO INTERVENORS'
MOTION FOR SUMMARY JUDGMENT

JEFFREY L. NEEDLE hereby declares, under penalty of perjury under the laws of the State of Washington, as follows:

1. That I am the attorney of record for the Intervenors in the above-entitled cause. That I am competent to testify to the matters contained herein and do so upon personal knowledge.

2. That attached hereto are true and correct copies of the following documents:

A. Safer Ships, Cleaner Seas, Lord Donaldson's Report

B. Standards of Training, Certification and Watchkeeping for Seafares (STCW), 1978.

C. IMO - Subcommittee on Standards of Training and Watchkeeping

D. IMO - International Regulations for Preventing Collisions At Sea.

E. A Summary of IMO Conventions, January, 1995.

F. IMO - Status of International Conventions relating to Marine pollution.

G. Implementation of IMO instructions - MARPOL.

H. News articles.

I. McCurdy, Gregg, L., Comment: An overview of OPA 1990 and its Relationship to Other Laws, *5 U.S.F. Mar. Law Journal 423* (1993).

J. Jarashow, Richard L., The New Regime for Oil Spill Liability in the United, *18 Canada - U.S. L.J. 299* (1992)

Dated this 15th day of July, 1996 at Seattle, Washington.

/s/ Jeffrey Needle
Jeffrey Needle
Attorney for Intervenors

SAFER SHIPS, CLEANER SEAS

REPORT OF LORD DONALDSON'S INQUIRY INTO THE PREVENTION OF POLLUTION FROM MERCHANT SHIPPING

Presented to Parliament by the Secretary of State for Transport by Command of Her Majesty
May 1994
CM 2560 LONDON: HMSO £38 net

* * * *

Chapter 6

Flag State Control

Introduction

6.1 In an ideal world **Flag States,** whose flags are worn by the world's shipping, would lay down, and enforce upon their own shipowners, standards of design, maintenance and operation which would ensure a very high standard of safety at sea. **Coastal States,** along whose coasts shipping passes, and **Port States,** at whose ports or anchorages shipping calls, would have no cause to concern themselves with the maintenance of such standards.

6.2 The present system of Flag State Control falls well short of this ideal. At any one time the fleet of any Flag State will be scattered throughout the world. No Flag State has the resources to police its fleet on a continuous and all-embracing basis. The most that it can do is to insist upon periodic surveys and to undertake *ad hoc* inspection if it learns that a ship has suffered a casualty or, for some other reason such as a Port State Control inspection, it suspects that its ship no longer complies with internationally agreed standards. Good

shipowners will maintain the seaworthiness of their ships regardless of whether a Flag State periodical survey is imminent. Regrettably, bad shipowners regard the imminence of such a survey as the only reason for spending money on maintenance or repairs and then only if satisfied that the survey will be thorough.

6.3 In this situation, even if Flag States were to comply to the full with their responsibilities, Coastal and Port States would still have a part to play. They would, in their own interests, be concerned to detect the few unseaworthy ships which had escaped the Flag State net. Their role would be to supplement and support Flag State Control, but not to substitute for it.

6.4 Regrettably it is beyond argument that not all Flag States live up to their responsibilities. Figures for deficiencies and detentions revealed by Port State Control inspections[1] show that, for example, of 61 Indian registered ships inspected over one in four were so seriously deficient that they had to be detained in port. Over 85 per cent of the inspections of Indian registered ships uncovered deficiencies. India, although a striking example, is by no means alone and a number of other Flag States also have a poor record. Port States, in their own vital interests, have thus been obliged to take on a much wider, more onerous and expensive task, namely picking up the pieces where Flag States have failed. Whilst we agree that Port State Control is no substitute for effective Flag State Control, we believe that there is a strong case for strengthening Port State Control, at least for the next few years, both as a means of drawing attention to the shortcomings of Flag States and of putting pressure on them

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[1] Under the Paris Memorandum of Understanding (which we describe in Chapter 11). The figures mentioned are in the Memorandum of Understanding on Port State Control Annual Report 1992.

to improve their performance. Our ideas on improving Port State Control are discussed in Chapter 11.

6.5 In 1992 6,500 different foreign flag vessels called at UK ports. Excluding short-sea ferries and fishing vessels, there were 82,600 arrivals of which 61,000, or 74 per cent, were foreign flagged. These figures demonstrate two interrelated facts of crucial importance.

6.6 First, that the proportion of the world's shipping which still flies the Red Ensign and which is thus directly or indirectly subject to UK Flag State Control has steadily declined. In 1970 the UK registered merchant fleet was the third largest in the world, amounting to over 11 per cent of the world's gross tonnage. By 1979, despite UK tonnage remaining at a similar level to that in 1970, this had fallen to under 7 per cent of because the overall increase in world tonnage. Since then the tonnage of the UK fleet has declined significantly as world tonnage has increased, to the extent that by June 1992 the tonnage of UK registered merchant vessels was less than a quarter of that in 1979 and amounted to just 1.35 per cent of the total[2].

6.7 Second, the UK, as a major trading nation wholly surrounded by sea, is heavily dependent upon foreign flagged shipping for the movement of its goods. The opening of the Channel Tunnel in 1994 will not greatly affect that dependency. If, due to inadequate Flag State Control, many of those ships are substandard, the UK is peculiarly at risk of its coastline being polluted. It follows that the UK has, of necessity, to take on the role of a major Port State Control authority. Indeed, given the decline in the size of the UK

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[2] Figures derived from Lloyd's Register Statistical Tables June 1992 – ISSN 0076 0234.

fleet, for the time being this must be its primary task (see Chapter 11).

6.8 A State which confers its nationality upon a ship, and thus authorises it to fly its flag, has an unfettered right to subject that ship to its laws. This enables it to impose and maintain standards of design, construction, equipment, maintenance and operation. Whilst there is no upper limit to these standards, there are lower limits. These stem from the various international Conventions to which Flag States are parties, such as the SOLAS, MARPOL 73/78 and Load Line Conventions, under which Flag States are required to establish that ships flying their flags comply with the provisions of those Conventions and to issue the necessary certificates of compliance. The Conventions under which certificates are issued require that these certificates should be accepted in good faith by other States party to those Conventions – for example, Regulation 17 of Chapter I of SOLAS states that:

> "Certificates issued under the authority of a Contracting Government shall be accepted by the other Contracting Governments for all purposes covered by the present Convention. They shall be regarded by the other Contracting Governments as having the same force as certificates issued by them."

The Certificates required under the main Conventions are detailed in Appendix D.

6.9 Economic and competitive considerations effectively prevent Flag States from imposing standards which are higher than those internationally agreed and any improvement in standards is thus only achievable by international agreement. The machinery for such agreement is provided by the

International Maritime Organization (IMO). This is not to say that some, if all too few, shipowners do not operate to higher standards out of pride or enlightened self-interest, but they cannot be required to do so through the mechanism of Flag State Control.

6.10 Notwithstanding the fact that these international agreements already cover a wide range of matters, there is considerable room for extending their scope. This is particularly true in relation to ship management and the human aspects of seafaring. There is also a need to upgrade the existing standards. We commend the efforts made by the UK Government to persuade IMO to take steps to achieve these improvements in the scope and strictness of internationally agreed safety standards. These efforts should be continued and intensified.

6.11 States which are party to the various Conventions undertake to implement them fully by domestic legislation and all or most do so. The United Kingdom has done so by numerous regulations made under enabling statutes. This is an effective method of implementation. But legislation is one thing. Enforcement of that legislation is quite another and it is in this respect that many Flag States are wanting. Unfortunately there are at present no effective sanctions which can be deployed against them.

Enforcement of Flag State Control

6.12 It is for Flag States individually to decide how to give effect to their international obligations. In some cases the international Conventions specify precise requirements. SOLAS, for example, requires minimum pressures at fire hydrants and MARPOL includes precise formulae for the calculation of positions of ballast tanks. But in other cases, the Conventions merely specify that equipment must be

"approved" by the Flag State or be "to the satisfaction of the Flag State". Sometimes such lack of precision is necessary for technical reasons or to allow for innovation. Regrettably in others it is merely designed to conceal differences of view between the members of IMO.

6.13 Methods of enforcement vary. All, at least in theory, involve initial and thereafter periodical surveys. These surveys may be undertaken by officials of the Flag State or by private organisations, such as classification societies, acting on its behalf. There is no particular merit in the adoption of one approach rather than the other or indeed in the adoption of a mixture of the two, provided always that the approach is effective. It is impossible to over-emphasise the importance of this proviso.

Flag State advantages

6.14 A Flag State has considerable advantages over Port States in controlling the safety of its vessels. It can and should maintain records of the construction details of the ship, subsequent modifications which it has had to approve and details of surveys leading to the issue of renewal of certificates. A Flag State has an unimpeded right of access to any ship on its register and can charge the shipowner for surveys and the issue of the necessary certificates.

The UK method of enforcement - the Marine Safety Agency (MSA)

6.15 Responsibility for carrying out the UK's Flag State duties falls mainly upon the Marine Safety Agency (MSA) which came into being on 1 April 1994. It is an executive agency of the Department of Transport. Until 31 March 1994 it was the Surveyor General's Organisation (SGO) which was part of the Marine Directorate of the Department of Transport.

6.16 MSA aims to develop, promote and enforce high standards of marine safety and prevention of pollution from ships. Its tasks include developing and monitoring safety and pollution prevention policies and standards; representing the Department of Transport's interests in these areas nationally and internationally; carrying out inspections of UK and foreign registered ships and enforcing standards by application of relevant sanctions; providing survey and certification services to the UK shipping industry; and setting the standards and monitoring the training of, and providing examination and certification services to UK seafarers. These tasks include not only Flag State functions but also Port State Control responsibilities which are discussed in Chapter 11 below. Individual surveyors are generally involved both in Flag State and other survey and certification work **and** in Port State Control inspections. The work and organisation of MSA are described more fully in paragraphs 6.35 - 6.46 below and in Appendix C.

6.17 It is for the Flag State to ensure that its maritime administration is capable of carrying out its responsibilities. The international standards cover a range of technical matters including design and construction, safety equipment, radio communications, safety of navigation, the carriage of dangerous goods and pollution prevention. Although the Flag State retains overall responsibility for ensuring that the international standards are properly implemented, it may delegate some or all of its functions to other organisations such as classification societies. The level of delegation differs between administrations. MSA delegates a number of functions, such as surveys of ships for the issue of Safety Construction and Load Line certificates, to five classification societies, namely Lloyd's Register of Shipping, The American Bureau of Shipping, Det Norske Veritas, Bureau Veritas and Germanischer Lloyd.

Present weaknesses of Flag State Control

6.18 When the international Conventions were originally drafted, most of the world's merchant fleet was owned by, and flew the flags of, the world's major maritime and trading powers. These States had already established survey and inspection of their ships as a matter of public policy aimed at protecting the safety of crews and passengers. While the setting of such standards was not immune from commercial pressures from shipowning interests, their enforcement was not subject to such pressures. This was presumably in reflection of the fact that in the UK, for example, there had been a long history of regulation through the Board of Trade and the fact that most UK trade was carried in UK ships which were subject to the same standards and accordingly competed fairly with one another. States had little or no direct financial interest in shipping and could apply and enforce standards in the interests of public policy without feeling any pressure to maintain or enhance their merchant fleets.

6.19 All that has changed. Today few States regard it as consistent with their national status and dignity to be without a register of national shipping of as large a size as possible. Some also regard such a register as a useful source of income. In seeking to achieve this aim, some see no need to limit eligibility to ships whose owners or operators have any connection with the State. They maintain what are called "open" registers. A few such States are landlocked and have no connection with the sea. Rather more include ships which are never likely to call at a national port. Perhaps in recognition of this fact one of the largest and, it has to be said, one of the most efficient, Liberia, maintains its register and discharges its responsibilities from an office in the USA. Relatively few Liberian ships ever call at Monrovia, their usual port of registry. Another example is Vanuatu, which has

few foreign exports and whose register is run from the USA and London.

6.20 All this might be unobjectionable if, despite the very considerable difficulties in enforcing standards on ships (and shipowners) which have no real connection with the State whose flag the ships fly, agreed international standards were universally enforced. However they are not. The vice of "open" registers is twofold. First, in practice they lead to varying standards of safety. This is easily demonstrated by **Figure 6.i** (overleaf) which shows the incidence of total losses by flag. Second, the existence of "open" registers and the consequent ease with which ships can be transferred to a different register and flag has led to some shipowners shopping around for the registers which have the lowest standards of enforcement and which, in consequence, involve them in the least expense. This is positively encouraged by some of the Flag States concerned which have even been known to advertise competitive "prices" for their survey and certification work.

6.21 **Figure 6.i** is also highly significant as showing that the national fleets with the worst losses are almost all expanding.

Flags of convenience

6.22 This expression is always used in a derogatory sense, but it is not always applied to the same flags. The International Transport Workers Federation (ITF) describes any register which does not strictly limit entry to nationals of the Flag State as a flag of convenience. This may be a legitimate use of the term from the ITF's point of view, but it by no means follows that ships flying flags of convenience as so defined are substandard. Indeed in terms of that definition the whole of the Red Ensign group of flags would be characterised as flags of convenience, since the

qualifications for entry, although limited, are not as limited as defined by the ITF. For example the UK register is required by EC law to be, and is, open to vessels the majority of whose 64 shares are beneficially owned by British or EC citizens or corporations. Qualifications for other Red Ensign registers are set out at Appendix G.

6.23 A more relevant definition for present purposes is that adopted by MSA as "an open register where the Flag State does not have the capability of supervising the safety of its ships".

* * * *

6.24 We would expand this definition to include Flag States which, whilst they may have the capability of such supervision, do not in fact exercise it for reasons of economy or a perverted desire to be competitive. We would also delete the reference to "an open register" since it is not the "openness" of the register which constitutes the vice. It is quite possible, if unusual, for a State with an open register to maintain standards which are as high or higher than is the case where a State maintains a closed register.

6.25 Accordingly we would define a flag of convenience as "a register where the State does not have the capability of supervising the safety of its ships or does not do so effectively".

Improving Flag State performance

6.26 The objective must be to eliminate flags of convenience as so defined. Progress will undoubtedly be slow because of the difficulty in undertaking international negotiations based upon the proposition that some of the participants are failing to honour their existing obligations. But a start must be made and it is to the credit of IMO that it has set up a Sub-

Committee on Flag State Implementation. **We recommend that the UK Government gives the Sub-Committee its full support.**

6.27 The Sub-Committee and IMO itself are undoubtedly faced with a major problem. One of the purposes of IMO is to encourage the removal of discriminatory or unnecessary action by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the world without discrimination. This is only achievable if all Flag States discharge their responsibilities to the full. If, as is the case at present, they do not do so, discrimination, if only in terms of Port State Control targeting, is inevitable. Furthermore, unless some major and rapid improvement can be achieved by simple persuasion, in our judgment further discrimination will have to be undertaken both in self defence by Port and Coastal States and by IMO in the general interest.

6.28 We earnestly hope that persuasion, backed by worldwide public opinion, will suffice but, if it does not, we consider that in the very near future IMO will have to consider two further initiatives. In the first IMO would publish, flag by flag, information provided by Port States on the extent to which defects are found in ships on inspection. This would bring pressure to bear not only in terms of national pride, but also commercially, because insurers, charterers and shippers could, should and, with a little urging, would take such a league table into account when considering contracting with owners of ships flying flags with a record of being substandard. In the second, which would only be necessary if the first failed to remedy the problem, Regulation 17 of Chapter I of SOLAS, and similar provisions in other Conventions, would be amended to remove the requirement to recognise certificates issued under the authority of a

Contracting Government if the record of the Government concerned was held by IMO, or by a Port State without dissent by IMO, to justify such a course. **We recommend that the UK Government in cooperation with other Port States should seek to carry this process forward on these lines.**

6.29 Quite apart from a general failure to supervise the compliance of their ships with internationally agreed standards, there is evidence that some Flag States are abusing their power to grant temporary dispensations. These are not used over a wide range of aspects but primarily in relation to manning certificates, for example in the case of a shortfall in manning due to illness of a crew member. We note with satisfaction that IMO's Maritime Safety Committee is considering what can be done to prevent unscrupulous Flag States abusing the system.

* * * *

Classification societies

7.27 As we mentioned briefly in Chapter 6, classification societies are international commercial organisations staffed by marine surveyors. Historically they came into existence to develop and monitor standards of design, construction and maintenance for the assistance of shipowners and underwriters. Shipowners needed technical guidance to ensure that their ships were seaworthy, and underwriters needed assurance that they were. Thus an underwriter who was asked to write a policy on hull and machinery would enquire whether, and might insist that, the ship was "classed" with a classification society. Being "in class" meant, and still means, that at the last periodical survey the society was satisfied not only that the ship then complied with its Rules and

Regulations, but that, barring accidents and subject to proper maintenance, it should so comply until the next such survey.

7.28 Classification society Rules and Regulations are separate from those developed by flag administrations to implement the relevant Conventions and as such they do not cover such matters as ship stability, life saving appliances and pollution prevention arrangements, as these are matters for the Flag State with which the ship is registered. However, as we saw in Chapter 6, a great many Flag States, including the UK, delegate a number of the statutory surveys for the issue of Convention certificates to the classification societies which undertake them in accordance with agreed procedures. We make a number of recommendations on this in Chapter 6.

The performance of classification societies

7.29 Ships are not necessarily, or even usually, in their home ports when the time comes for them to be subjected to a periodic survey and, between surveys, they may be damaged at any time or any place. It follows from this that if a classification society is to be able to perform its monitoring role, whether on behalf of the shipowner or of the Flag State, it needs to have the very considerable resources necessary to maintain a worldwide organisation. In recent years the number of classification societies has increased rapidly to 49. Inevitably many do not have the requisite resources or indeed expertise.

7.30 It was therefore no surprise to receive evidence of widespread dissatisfaction with the performance of some of these societies. It was in part with a view to addressing this problem that the International Association of Classification Societies (IACS) was formed. Full membership of IACS is limited to such societies as in its opinion have the necessary resources and expertise to fulfil their role. There are at

present 11 such members, together with two associate members who are on the way to full membership. IACS members survey over 90 per cent of the world's merchant shipping tonnage.

7.31 Individual societies make their own classification Rules and Regulations. IACS has taken the initiative with a view to harmonising standards. It has also produced guidance for owners and operators of bulk carriers identifying potential weaknesses and remedies and has introduced enhanced surveys for bulk carriers and tankers

7.32 IACS has developed a Quality System Certification Scheme (QSCS) which has become a mandatory requirement for members. The Scheme involves periodic auditing of members' internal quality systems to ensure that they are operating properly and that they conform with the IACS "Code of Ethics" and quality system requirements. Members whose systems pass the audit procedure are issued with a quality system certificate of conformity valid for three years. Renewal is subject to further audit. Members whose quality systems are not up to standard may have their certificates suspended if deficiencies are not rectified within a specified period.

7.33 IACS invited both IMO and underwriting organisations to participate in the QSCS. IMO agreed to take part but underwriters did not. We consider that the widest possible external involvement in monitoring and improving the Scheme is in the interests of safety and **we recommend that underwriters' organisations reconsider their position.**

7.34 As we mentioned briefly in Chapter 6 the Department of Transport also monitors the performance of the five classification societies which carry out work on its behalf. MSA has in place audit arrangements based on a

Memorandum setting out the relationship between it and the societies in respect of the survey and certification of ships. Each society is subject to audit on a two yearly cycle.

7.35 The existence of IACS and the initiatives which it has taken are clearly of great benefit in terms of safety at sea. This can be demonstrated from an analysis of the level of detentions of ships by UK Port State Control inspectors. Only one foreign ship in ten visiting UK ports is classed with a non-IACS member, yet 19 per cent of ships detained are so classed. Even if the record of ships classed with IACS members is not one which would justify any degree of complacency, the contrast is glaring.

7.36 Something further needs to be done if competitive pressures are not to drive out societies with good records and favour those which provide a cheaper but worse service. This is coming to be appreciated and the new IMO Sub-Committee on Flag State Implementation has prepared a draft Assembly Resolution containing guidelines for the authorisation of organisations acting on behalf of administrations. These guidelines, which were adopted by the Eighteenth Assembly in November 1993, are based only on qualitative criteria. This work is being echoed by the European Commission draft Directive on classification societies. However, unlike the Assembly Resolution, the draft EC Directive contains both quantitative and qualitative criteria to ensure that these organisations are professionally reliable and able to maintain proper control of compliance with safety and environmental protection standards on the vessels they classify.

7.37 **We support the EC's proposals and the UK Government's backing of them. We recommended that the UK Government should work through IMO to press for a review of the IMO guidelines and minimum standards for classification societies with a view to improving them as**

necessary and to developing, as a matter of urgency, detailed specifications on precise survey and certification functions delegated to such organisations. The UK Government should also work through IMO for swift implementation of minimum standards for all work delegated by Flag States to classification societies. Classification societies which do not meet these international standards should not be granted international recognition. A similar recommendation was made by the House of Lords Committee chaired by Lord Carver (see paragraph 1.28) and accepted by the UK Government in its response to the Committee's report.

* * * *

Training

8.18 Although the human element in incidents is very considerable, the chain of factors can be complex and remedies can be difficult to determine. P & I Club experience shows that maiden voyages are often times of high risk, presumably because of relatively untried equipment with which the operators are unfamiliar. The same is often noted after a refit. In some cases the best hope for reducing the chance of human error lies with properly designed operational procedures, good operational management and good working conditions. We believe that not enough attention is paid to familiarity with particular items of machinery and equipment and, most importantly, to instruction and practice in procedures for dealing with emergencies. Training can both reduce the risk of accident and lessen its effects by helping to ensure a successful human response to the unexpected.

8.19 Research by the Tavistock Institute of Human Relations for the Department of Transport's Marine Directorate[3] has highlighted the need for more emphasis on developing good judgment in training and on practical training at sea. Accident investigations place similar stress on these factors and on requiring all ships to observe at least the internationally recognised standards of training, operation and maintenance.

8.20 We heard evidence of inadequate training, both initially and as new equipment and methods are introduced. It was put to us that UK Masters would often find themselves carrying out tasks which, with a properly trained staff, they would not have to do themselves. These unwarranted additional duties can obviously worsen the problems of fatigue and stress in a lightly-manned ship.

8.21 In some people's minds training goes little further than achieving a grade in an examination after serving for so many years at sea. This is not enough: training is available from a wide range of sources to suit individual requirements and should be seen as a constant process of refreshing and adding to knowledge and capability. Colleges in a number of countries, including the UK, train to very high standards and on-board training by experts is also available, along with courses on particular pieces of equipment provided by the manufacturer.

8.22 Of course, good seamanship also has to be learnt at sea, but it is safer to practise responses to emergencies in the classroom. An excellent means of bringing a sense of realism into that work is through simulators on which people can exercise their skills and deal with emergencies in such areas as navigation, engineering and the handling of dangerous

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[3] *The Human Element in Shipping Casualties*, Marine Directorate, Department of Transport, (HMSO 1991)—ISBN 0 11 551004 4.

cargoes. Generally, there is a need to ensure that all of those serving at sea have received basic craft, safety and survival training as well as the higher technical training required in order properly to carry out their job and to deal with emergencies. **We recommend that the Department of Transport should raise these points with UK owners, charterers and insurers, and seek discussions on them at IMO.**

8.23 We discuss the specific problems of training of UK crews in paragraph 8.58 onwards at the end of this chapter.

Convention on Standards of Training, Certification and Watchkeeping 1978 (STCW)

8.24 Existing international standards are set out in STCW, which was negotiated through IMO. Although conceived as a minimum requirement below which no Flag State should fall, the lack of clear definition of training standards means that STCW is often in effect the maximum level above which many States fail to rise. Due to this lack of a clearly defined standard, the quality of training abroad differs widely. These differences may well account for the wide variations in on-board technical competence which are apparent, for example, from Port State Control inspections.

* * * *

Weaknesses in the system

11.14 There are two obvious weaknesses in the system of control envisaged by the international Conventions. First it does not fully protect good shipowners from inspections at every port of call with the consequent inevitable, if often minor, disruption to the ship's routine when Port State Control officials board and require production of the relevant certificates. Second it does not adequately deal with

substandard ships. This is because the system of control provided in SOLAS and other Conventions is based upon the assumption that notification of deficiencies to the Flag State and, if they have not been fully remedied, to the authorities at the next port of call, will ensure that for the future the ship will meet the international standards. This is an entirely false assumption given the lamentable state of much Flag State Control and the fact that the next port of call may be in a State which has an equivocal attitude towards Port State Control or has inadequate resources to follow up the notification. Once a ship has been found to be substandard, she needs careful watching for the future. All ports at which she may thereafter call, and not just the next port, need to be alerted to this fact.

* * * *

The United States and "unlimited liability"

19.28 The United States has not ratified the Civil Liability or Fund Conventions and has established a separate domestic liability and compensation system under the Oil Pollution Act 1990 (OPA 90). Prior to its enactment, Federal maritime law preempted State law on marine limitation matters but OPA 90 allows the development of State liability and compensation laws for oil pollution. Ships operating to the United States therefore face varying State provisions as well as those of Federal statute.

19.29 Under OPA 90 the owner is strictly liable for oil pollution but is allowed to limit his liability to an amount based on the tonnage of his ship. The provisions of OPA 90 differ from those of the Conventions in that the limits for liability are significantly higher and that it is much easier to break the owner's right to limit his liability. Many observers consider that despite the references to limitation in most cases, owners involved in an oil spill in United States waters

effectively face unlimited liability. In addition to clean-up costs and economic loss, OPA 90 allows claims for non-economic environmental damage but the basis for such claims is not specified in the Act. Those who insure owners' third party liabilities are subject to direct action. It is this provision, together with the risk of unlimited liability, that has made insurers reluctant to provide the certificates of financial responsibility required under the terms of OPA 90.

19.30 Under OPA 90 claims which exceed the shipowner's limit can be made against a revolving Federal Fund of $1 billion financed by a tax on US oil. This Federal Fund, which has yet to be tested by a major incident, is intended to provide early compensation. It appears that the Federal Fund will initiate recourse action against shipowners to recover any payments it makes including breaking the owner's right to limit his liability. The owner is responsible for initiating and monitoring any clean-up operations following a spill and any failing by the owner in this respect can affect his right to limit his liability. The United States is unique in placing responsibility for the clean-up of pollution outside the ship on the owner. Responsibility for dealing with pollution from ships in UK waters is described in Chapter 21.

19.31 The main problem with the liability and compensation regime established under OPA 90 is that it creates great uncertainty for operators and insurers. The threat of unlimited liability already seems to have deterred some shipowners from operating to the United States and insurers levy additional premiums for ships intending to operate in US waters. The shipowner's liability is limited in practice by what he can pay before becoming bankrupt and insurers are understandably reluctant to accept responsibility for payments beyond the agreed cover. The best way for shipowners to protect their assets under the threat of unlimited liability may

be to create one ship companies, thus limiting their liability to the point at which bankruptcy occurs. This does not encourage responsible operators.

19.32 We reject arguments that the United Kingdom should adopt a liability and compensation regime similar to that operating in the United States. The regime established under OPA 90 is, as yet, untested. It has received no support internationally, even from those who have reservations about the 1992 Protocols. And there is no guarantee that the bad operators will be deterred from operating to the US. Instead, it is more likely that the better operated, larger fleets will be deterred because of the unreasonable level of risk. There is no doubt that OPA 90 has driven insurance costs up significantly and we believe that this money would be better spent on improving standards and on preventive measures. We also consider that it is undesirable to place the responsibility for the clean-up of pollution on the shipowner who is more unlikely to have the expertise of a national body such as the UK's Marine Pollution Control Unit,

Congress of the United States
Washington, DC 20515

September 28, 1993

Commandant J. William Kime
U.S. Coast Guard
2100 Second Street SW
Washington, DC 20593-0001

Dear Commandant Kime:

We are writing to express our grave concern at the U.S. Coast Guard's attempt to obstruct the implementation of Washington state's oil spill prevention laws. This objection to state standards for Canada-bound vessels transiting Washington state waters is both surprising and disappointing.

Arguably, the waters of Washington state constitute some of the most biologically productive and sensitive marine ecosystems in North America and potential threats to our resources from vessels traveling through our waters must be taken very seriously. Washington state serves as a model both in efforts and commitment to afford the highest degree of protection from environmentally destructive oil spills. Governor Mike Lowry has our strongest support for these efforts and we agree with his assertion that it is not within the best interests of the state, nor the resources of Puget Sound and the Washington coast, to delay implementation of any vessel traffic safety or spill prevention measures.

We are extremely concerned with the Coast Guard's threats to void state oil prevention standards for these Canada-bound vessels. In the Oil Pollution Act of 1990 Congress provided that state laws, requirements and jurisdiction would not be preempted by federal law. The U.S. Coast Guard

should not be obstructing the state's efforts to protect state waters.

While the Coast Guard contends the state's rules may imperil international agreements, the requirements of a limited number of vessels to file oil spill prevention plans need not jeopardize the Vessel Traffic Management Agreement between the United States and Canada or the internationally recognized vessel traffic management scheme in the Strait of Juan de Fuca. This system is mandatory on all vessels that traffic the Strait of Juan de Fuca and it is in the interest of both governments to maintain this important safety program. While we applaud the Coast Guard's efforts to seek agreements through the International Maritime Organization on measures very similar to those Washington state is implementing, we do not believe one process necessarily jeopardizes the other.

It is critical that we resolve this issue as quickly as possible to bring a comparable degree of safety to all vessels transiting U.S. waters, regardless of flag or destination. Previous oil spills have occurred in the area of the Strait of Juan de Fuca, and there are several major vessel incidents each year at the entrance to the Strait. In addition, we are faced with the realization that a major spill in Puget Sound would be an unprecedented disaster in U.S. waters.

We appreciate your personal efforts to cooperate with Washington state and Governor Lowry and to seek a resolution to this issue with Canadian authorities. We hope this issue can be laid to rest quickly and the highest standards of protection currently mandated by state and federal legislation be quickly implemented for the Washington coast and Puget Sound.

Sincerely,

/s/ Slade Gorton	/s/ Patty Murray
Slade Gorton U.S. Senator	Patty Murray U.S. Senator
/s/ Norm Dicks	/s/ Al Swift
Norm Dicks Member of Congress	Al Swift Member of Congress
/s/ Jolene Unsoeld	/s/ Jim McDermott
Jolene Unsoeld Member of Congress	Jim McDermott Member of Congress
/s/ Maria Cantwell	/s/ Jay Inslee
Maria Cantwell Member of Congress	Jay Inslee Member of Congress
/s/ Mike Kreidler	/s/ Jennifer Dunn
Mike Kreidler Member of Congress	Jennifer Dunn Member of Congress

cc: The Honorable Federico Pena, Secretary of Transportation
The Honorable Warren M. Christopher, Secretary of State
Governor Mike Lowry

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR

Case No. C95-109C

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Plaintiff,

v.

MIKE LOWRY, Governor of the State of Washington, et al.,
Defendants.

THE WASHINGTON ENVIRONMENTAL COUNCIL, THE NATURAL RESOURCES DEFENSE COUNCIL, Inc., and OCEAN ADVOCATES, Inc.,
Intervenors.

AFFIDAVIT OF ARTHUR McKENZIE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' AND INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Arthur McKenzie, being sworn, states:

1. I am the Director of the Tanker Advisory Center, Inc. and submit this affidavit in opposition to Plaintiffs'

Motion for Summary Judgment and in further support of the Motion for Summary Judgment of Defendant State of Washington and Intervenors Washington Environmental Council, Natural Resources Defense Council, and Ocean Advocates.

Qualifications

2. As set forth in my affidavit in support of Intervenors' Motion for Summary Judgment, I worked for over 40 years for Exxon Corporation on issues relating to tanker operations. I then founded and for over 15 years have directed the Tanker Advisory Center which provides advice to those wishing to charter tankers. One of the most important considerations in tanker chartering, if not the most important factor, is cost. Therefore, in my current capacity I must stay abreast of current data concerning tanker operation costs.

Intertanko's Cost Claims Are of No Consequence

3. Plaintiff Intertanko discusses in its Motion for Summary Judgment the costs it expects its members to incur in complying with the Washington State BAP rules. In particular it asserts that it will cost Intertanko members approximately $12,000 to prepare a pollution prevention plan and approximately $80,000 to install the automatic tow package. *See* Affidavit of Miles Kulukundis at p. 3, line 24; Affidavit of Richard Du Moulin at p. 5, ¶ 11. In addition Intertanko asserts that the costs of compliance will be "substantial," *id.*, but does not attempt to quantify them. These costs, however, are of no consequence to tanker operations. In comparison to other tanker operation costs, the costs of complying with the BAP rules, even assuming Intertanko's cost figures to be correct, are insignificant.

4. As described in detail below, the average annual costs for the larger tankers importing oil into Puget Sound

(which are most likely to represent the bulk of vessels) range between $13,600,000 and $19,000,000 for U.S. tankers (which are the majority of tankers calling at Puget Sound) and between $8,400,000 and $12,000,000 for non-U.S. flag tankers. Thus, even if the cost of the BAP rules were double Intertanko's claims and were $200,000, these costs would constitute between 1% and 2.4% of the tankers' *annual* total operating costs. Since in fact many of the BAP compliance costs would not be repeated each year (such as the $80,000 installation of the tow package), the actual impact would be far less - probably less than one percent.

5. On the basis of my experience with tanker operations and chartering and tanker costs, I can state with confidence that this increase in costs of less than one to two percent is far less than the average variability of costs incurred by a tanker. In short, the incremental costs imposed by the Washington BAP rules are too small in relation to other tanker operation costs to make an operative difference. They certainly would not make a significant difference or hinder otherwise permissible tanker activity.

Any Incremental Costs Are Likely to be Offset by Reduced Pollution Costs

6. Intertanko's costs argument looks only to the increased immediate outlay required by the BAP rules. It does not examine the likely reduced outlays to respond to oil spills to determine a net economic impact. While it is impossible to precisely quantify the reduction in spills the BAP rules would bring about, it is my opinion that the reduction would be significant. Given that virtually any oil spill can cause the discharger to incur response costs of several hundred to many millions of dollars, the prevention of even one small spill would reduce the net economic impact of these rules to the tanker industry. For this reason as well, Intertanko's

arguments that the cost of complying with the BAP rules constitute a hindrance to free commerce is meritless.

Calculation of Average Annual Tanker Costs

7. As noted above, the annual costs for a tanker importing oil in Puget Sound range between $8.4 and 19 million. These figures are set forth in Exhibit A and explained below.

8. Costs for tankers will depend on whether it is a U.S. flag or foreign flag tanker and on the age of the tanker. Generally, tankers constructed in the United States cost more than tankers constructed elsewhere due to much lower productivity. Similarly, older tankers, termed "second hand tankers" generally incur higher operating costs but are already more fully depreciated. Thus, the analysis below provides figures for each category of cost for U.S. and non-U.S. flag tankers and for second hand new tankers. *See* Exhibits A and B, which are charts I prepared.

9. The costs incurred by a tanker can be grouped into several categories: capital cost, operating expenses, and voyage costs consisting of fuel costs and port charges. It is on the basis of these costs, among other things, that tanker companies can set charter rates.

10. First, the *capital costs* represent the original building or purchase cost of the tanker spread out over the life of the tanker. Intertanko calculates these figures assuming a 25 year tanker life and a discount rate (the "price of money" or the interest that money could earn if not directed to the tanker) of 10%. *See* Intertanko Monthly Market Report 1 (May 1, 1996) (Attached as Exhibit C). For purposes of my analysis, I have used the figures for "Suezmax" tankers which include the 125,000 dwt maximum size permitted into Puget Sound.

11. According to Intertanko's Monthly Market Report, a new 125,000 dwt tanker built outside the United States will cost approximately $54 million and has a daily capital cost of approximately $20,000. Similarly, an older 125,000 dwt tanker would be worth approximately $6.5 million with a daily capital cost of approximately $4,000.

12. Second, tankers also have *daily operating expenses*. These expenses include the cost of the crew, including salaries, vacation pay, medical insurance and food; standard ship maintenance; ship stores such as paint, lubricating oil, and rope; insurance on the ship itself (on the "hull") and protection and indemnity insurance relating to injuries that the ship may cause (including oil spill damages); and the ship's shoreside administration.

13. According to Intertanko, operating costs for tankers in the 125,000 dwt range are approximately $11,000/day for older tankers and $9,000/day for new tankers. *See* Intertanko Monthly Market Report (Exhibit C). Newer tankers are generally better designed and require a smaller crew and less ongoing maintenance and for that reason the operating costs of these ships are lower than the equivalent costs for older tankers.

14. Third, a tanker uses fuel and thus incurs fuel costs. These costs vary widely with the ship. Steam turbine powered ships use far more high viscosity fuel than motor tankers and newer ships with more efficient engines and hulls use less fuel than older ships. Attached as Exhibit D is a chart I prepared based on *The Tanker Register 1996* by Clarkson Research Studies in London showing the average fuel consumption of various tankers of the size permitted to enter Puget Sound. Depending on the tanker, the ship may consume anywhere between 40 and 120 tons of fuel oil per day.

15. The cost per trip of fuel can be calculated by determining the round trip voyage distance (in nautical miles), dividing that by the ship's speed (in knots) and by 24 to determine the number of days of the voyage, and multiplying that by the daily at-sea fuel consumption. The fuel used by tankers is generally high viscosity fuel which during the last few months has cost approximately $100/ton around the world.

16. In determining in-port fuel costs, which reflect the time the ship is moving more slowly near the dock and when powering the cargo pumps and other machinery when at berth, I have followed industry practice and assumed that in port fuel consumption as one half of the at sea consumption.

17. Finally, a tanker incurs *port charges*. These charges primarily include the cost of pilotage and tug boats. At some ports around the world, fees are levied on ships using the port, although these fees are not charged in Puget Sound or Valdez. In the Puget Sound area, the pilot fees are generally in the $5,000 - $10,000 range; the tugs may cost approximately $40,000. *See* the chart I prepared based on Intertanko's *Disbursements for Tankers 1993* (attached as Exhibit E).

18. Most tankers importing oil through Puget Sound are U.S. flag tankers carrying oil from Alaska. Only a modest amount of oil comes from foreign sources such as Indonesia. The costs for U.S. Flag tankers are different from the Intertanko figures which are based solely on non-U.S. flag vessels. As mentioned above, capital costs for U.S. flag tankers are between 50% and 100% higher; for purposes of my analysis I have assume the costs are only 50% higher. Thus, capital costs for new U.S. flag tankers would be approximately $30,000 per day and for second hand tankers would be approximately $6,000 per day.

19. Similarly, the operating costs for U.S. flag tankers are higher due to higher wage rates; on average these costs are at least 25% higher than the Intertanko figures. Thus, daily operating costs for U.S. flag vessels would be approximately $11,250 for new tankers and $13,750 for older ones. Voyage costs for U.S. flag and non-U.S. flag tankers will be approximately the same.

Calculation of Total Annual Costs

20. A tanker carrying oil into Puget Sound will incur all the costs outlined above. (A chart setting out these costs is attached as Exhibit A). As noted, most oil imported into Puget Sound comes from Alaska. Most likely, the bulk of this is carried in the largest possible tankers - those of approximately 125,000 dwt (the Puget Sound maximum). The round trip from Valdez, Alaska to Anacortes, Washington is 2,402 nautical miles, based on the *New Worldwide Tanker Nominal Freight Scale applying to the carriage of oil on bulk,* (Code name "Worldscale") (January 1, 1992). *See* Exhibit E. A U.S. flag tanker capable of cruising at 15 knots would require 6.7 days for the round-trip passage. It would also require 4 days in port for a total of 10.7 days per round trip. Thus, on each trip, the tanker would incur capital and operating costs of approximately $211,000 (second hand tankers) to $441,000 (new tankers).

21. In addition, the tanker would incur at-sea fuel charges for the 6.7 days of sea transit of $81,000 (assuming an old steam turbin tanker using 121 tons/day) to $30,000 (assuming a new motor tanker consuming 45 tons/day). The tanker would also incur in-port fuel charges for approximately 4 days of approximately $24,000 for old tankers and $8,800 for new tankers (assuming as noted above that in port consumption is one half of at sea consumption).

22. Finally, this tanker carrying oil from Valdez to Puget sound would incur port charges of approximately $50,000 in each of Valdez and Anacortes.

23. Thus, the total voyage costs for U.S. flag tankers carrying oil from Alaska to Puget Sound are approximately $579,800 for new tankers and $416,000 for second hand tankers. Since these tankers work approximately 350 days per year, they can make 32.7 trips (350/10.7) per year. *The total annual operating costs, therefore, amount to $18,959,000 for new U.S. flag tankers and $13,605,000 for second hand U.S. flag tankers.*

24. A similar analysis can be performed for non-U.S. flag tankers importing oil from abroad. A frequent oil exporting port is Arjuna, Indonesia. The round trip voyage from Arjuna, Indonesia to Anacortes, Washington is approximately 14,716 nautical miles. Assuming the tanker travels at 14 knots, the round trip voyage would last 48 days, with 44 days at sea and 4 in port.

25. For a new non-U.S. flag tanker with daily capital and operating costs of approximately $29,000, this results in voyage costs of $1,392,000. For an older tanker with daily capital and operating costs of approximately $15,000, this voyage would cost $720,000.

26. In addition, a new tanker would likely consume approximately 42 tons/day of fuel resulting in at sea fuel charges of $184,000 and in port fuel charges of $8,400. An older tanker consuming 80 tons/day would incur at sea fuel costs of $352,000 and in port fuel costs of $16,000. *See* Exhibit A. Finally, the tanker would incur port charges of $10,200 in Arjuna and $50,000 in Anacortes. Thus the total voyage cost would be $1,644,600 for a new foreign flag tanker and $1,148,200 for a second hand foreign flag tanker.

27. Since the trip from Arjuna is longer, these tankers can make fewer trips per year. Again assuming the work 350 days/year, these tankers could make 7.3 trips per year. Thus, *the total annual operating costs for foreign flag tankers are approximately $12,005,000 for new tankers and $8,380,000 for second hand tankers.*

28. Thus, given total annual operating costs of between $13.6 million and $19 million for U.S. flag tankers and between $8.4 million and $12 million for foreign flag tankers, the potential incremental outlay required by the BAP rules - not including the benefit to be gained from reduced oil spill response costs - would be only 1-1.5% for U.S. flag tankers and 1.5-2.4% for foreign flag tankers. Given the total costs of tanker operations and the benefits of the BAP rules, these costs are clearly not enough to change operational practices or lose potential charters.

Conclusion

29. For the reasons stated above, I believe that the Washington State BAP Rules are reasonable and effective measures which are not inconsistent with or in conflict with other existing tanker operation standards, will help prevent oil spills and associated pollution, and will not impose an unreasonable burden on tanker operations. The Rules are, in short, the "best available protection" and should be upheld.

/s/ Arthur McKenzie
ARTHUR McKENZIE

Sworn to before me this 27th Day of June, 1996

/s/ Stella Li Li Liang
Stella Li LI Liang
Notary Public, State of New York
No. 41-4793392
Qualified in Nassau County
Commission Expires October 31, 1997

Supreme Court, U.S.
FILED
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Nos. 98-1701 & 98-1706

IN THE

Supreme Court of the United States

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

-and-

UNITED STATES OF AMERICA,

Petitioner,

v.

GARY LOCKE, Governor of the State of Washington, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF ON THE MERITS FOR PETITIONER INTERTANKO

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QUESTIONS PRESENTED

1. Whether federal statutes, regulations and international treaty commitments of the United States that prescribe comprehensive standards for tank vessel operations, personnel qualifications and manning expressly or impliedly preempt attempts by an agency of the State of Washington to enforce regulations that impose different standards and requirements governing the same subject matters aboard the same tank vessels.

2. Whether an individual state may deny entry to, or penalize for non-compliance with state safety and environmental protection regulations, a vessel that has been found by the vessel's nation of registry and the United States Government to be eligible to enter the United States under multilateral treaty commitments, federal law, and federal regulations governing safety and environmental protection.

RULE 29.6 STATEMENT

The International Association of Independent Tanker Owners ("Intertanko"), is a trade association whose members are the owners or operators of U.S. and foreign tank vessels. Intertanko is organized as a non-profit entity under the laws of Norway. It issues no shares of ownership.

STATEMENT OF THE PARTIES

Intertanko was complainant in an action seeking a declaratory judgment and injunctive relief from the United States District Court for the Western District of Washington. Intertanko's complaint challenged on constitutional grounds tank vessel regulations promulgated by the State of Washington. Intertanko appealed an adverse decision by the District Court to the United States Court of Appeals for the Ninth Circuit. The United States of America intervened as a party Appellant in this matter before the Court of Appeals and was granted intervenor status on June 6, 1997. Intertanko and the United States separately petitioned this Court to issue a writ of certiorari to the Court of Appeals. Both petitions were granted on September 10, 1999, and were consolidated by the Court for briefing and argument on the merits.

The Respondents are officials of the State of Washington responsible for enforcing the challenged State tank vessel regulations. Respondent-Intervenors are organizations who intervened in support of the State at the district court level and who participated in briefing and argument at the appellate level.

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OPINIONS BELOW

The order and amended opinion of the Court of Appeals, *International Ass'n of Independent Tanker Owners v. Locke*, Docket No. 97-35010, is reported at 148 F.3d 1053. (Pet. App. A.)[1] The order of the Court of Appeals denying rehearing and rehearing *en banc*, including the dissenting opinion of Judge Graber, is reported at 159 F.3d 1220. (Pet. App. C.) The opinion of the district court granting summary judgment against petitioner Intertanko and denying Intertanko's motion for summary judgment, *International Ass'n of Independent Tanker Owners v. Lowry*, Docket No. C95-1096C, is reported at 947 F. Supp. 1484. (Pet. App. B.)

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on June 18, 1998, and amended that order on August 31, 1998. (Pet. App. A.) Rehearing and suggestion for rehearing *en banc* were denied on November 24, 1998. (Pet. App. C.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).[2]

STATUTORY PROVISIONS INVOLVED

Intertanko relies primarily on the Supremacy Clause and the Treaty Clause of the United States Constitution, and the federal Ports and Waterways Safety Act of 1972, as amended by the Ports and Tanker Safety Act of 1978, and the Oil Pollution Act of 1990 (Title 46, United States Code, Subtitle II).

Article VI, Clause 2 of the Constitution of the United States reads:

---

1. All references to "Pet. App." are to the Appendix submitted by Intertanko with Intertanko's Petition for Writ of Certiorari.

2. The United States of America sought and received two extensions of time in which to file a petition for a writ of certiorari in this matter. In each instance, petitioner Intertanko filed conforming requests. On February 17, 1999, Justice O'Connor granted an extension of thirty days to and including March 24, 1999. On March 15, 1999, Justice O'Connor granted an extension to and including April 23, 1999.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (Pet. App. D at 91a.)

The Treaty Clause states that the President of the United States: ". . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." (Pet. App. D at 91a.)

The Ports and Waterways Safety Act, in pertinent part, requires the Secretary of the United States Department of Transportation to issue regulations with respect to designated subject matters concerning tank vessels:

> § 3703 Regulations
>
> (a) The Secretary shall prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels to which this chapter applies, that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment. . . . Regulations prescribed under this subsection shall include requirements about —
>
> (1) superstructures, hulls, cargo holds or tanks, fittings, equipment, appliances, propulsion machinery, auxiliary machinery, and boilers;
>
> (2) the handling or stowage of cargo, the manner of handling or stowage of cargo, and the machinery and

> appliances used in the handling or stowage;
>
> (3) equipment and appliances for life-saving, fire protection, and prevention and mitigation of damage to the marine environment;
>
> (4) the manning of vessels and the duties, qualifications, and training of the officers and crew;
>
> (5) improvements in vessel maneuvering and stopping ability and other features that reduce the possibility of marine casualties;
>
> (6) the reduction of cargo loss if a marine casualty occurs
>
> (7) the reduction or elimination of discharges during ballasting, deballasting, tank cleaning, cargo handling, or other such activity. . . .

46 U.S.C. § 3703(a); (Pet. App. E at 197a-198a.)

The United States Coast Guard has promulgated federal regulations that impose requirements and standards on U.S. and foreign tank vessels pursuant to Titles 33 and 46 of the United States Code.[3] In 1995 the State of Washington's Office

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3. The relevant subchapters in Title 33 of the Code of Federal Regulations are: Subchapter A, General Provisions (33 C.F.R. Parts 1-27); Subchapter D, International Navigation Rules (33 C.F.R. Parts 80-82); Subchapter E, Inland Navigation Rules (33. C.F.R. Parts 84-96); Subchapter I, Anchorages (33 C.F.R. Parts 109-110); Subchapter L, Waterfront Facilities (33 C.F.R. Parts 125-128); Subchapter O, Pollution (33 C.F.R. Parts 151-159); and Subchapter P, Ports and Waterways Safety (33 C.F.R. Parts 160-168).

The relevant subchapters in Title 46 of the Code of Federal Regulations are: Subchapter A, Procedures Applicable to the Public (46 C.F.R. Parts 1-9); Subchapter B, Merchant Marine Officers and (Cont'd)

of Marine Safety promulgated as final rules Best Achievable Protection ("BAP") regulations governing tank vessel design, construction, operation, manning and personnel qualifications pursuant to Chapter 88.46 of the Laws of the State of Washington. These regulations are published at sections 317-21-010 *et seq.* of the Washington Administrative Code ("WAC"). (Pet. App. J.) A table setting forth the coincidence between the subject matters of the challenged Washington State regulations and federal regulations, statutes and treaties was provided the Court in the Appendix to Intertanko's Petition. (Pet. App. K, 349a-353a.)

All other statutes and international agreements relied on or at issue have been or will be provided to the Court in appendices submitted by the parties.

STATEMENT OF THE CASE

A. Background

In 1989, the governments of the states of Washington, Oregon, Alaska, California, and Province of British Columbia formed the "States/British Columbia Task Force" for the purpose of coordinating activities relating to oil spills. In

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Seamen (46 C.F.R. Parts 10-16); Subchapter D, Tank Vessels (46 C.F.R. Parts 30-39); Subchapter E, Load Lines (46 C.F.R. Parts 41-47); Subchapter F, Marine Engineering (46 C.F.R. Parts 50-64); Subchapter G, Documentation and Measurement of Vessels (46 C.F.R. Parts 66-69); Subchapter I, Cargo and Miscellaneous Vessels (46 C.F.R. Parts 90-105); Subchapter J, Electrical Engineering (46 C.F.R. Parts 110-113); Subchapter N, Dangerous Cargoes (46 C.F.R. Parts 140-155); Subchapter Q, Equipment, Construction, and Materials: Specifications and Approval (46 C.F.R. Parts 159-165); Subchapter S, Subdivision and Stability (46 C.F.R. parts 170-174); Subchapter V, Marine Occupational Safety and Health Standards (46 C.F.R. Parts 197-198); and Subchapter W, Lifesaving Appliances and Arrangements (46 C.F.R. Part 199).

The Coast Guard regulations also accommodate differing conditions in various localities. *See* Reply Brief of Appellant Intertanko at 7, 11-12, and nn.2, 4-13.

July 1990, the Task Force issued draft recommendations for legislation and regulations that individual state and provincial state governments were encouraged to adopt. They included state requirements for accident reporting, navigation and towing equipment, seafarer training, substance abuse testing, manning and personnel standards, and vessel prevention plans. The Task Force issued its final recommendations in October 1990. (JA-73, excerpts of Final Report.)

On May 21, 1991, the Governor of Washington signed legislation that is codified at Chapter 88.46 of the Revised Code of Washington ("R.C.W."). R.C.W. ch. 88.46. The statute requires tanker owners and operators to file oil spill prevention and response plans with the State and authorizes penalties for violators. *See* R.C.W §§ 88.46.070. .080, and .090. Shortly thereafter, the newly-formed Washington State Office of Marine Safety ("OMS") issued Interim rules pursuant to R.C.W. § 88.46 requiring vessel operators to submit proprietary company operating manuals. OMS initiated a rulemaking proceeding to create permanent vessel and crew requirements that, using the Task Force recommendations and the internal company manuals as starting points, were promulgated as the contested Best Achievable Protection ("BAP") regulations. (Pet. App. J at 307a-345a.) Issued on December 9, 1994, the BAP regulations impose requirements for tank vessel design, construction, operation, manning and personnel qualifications for tank vessels entering Washington State waters. The State applied the BAP regulations to all tank vessels entering Washington State waters, including those merely transiting to other jurisdictions such as Oregon and Canada. The final regulations became effective in July, 1995.

B. Procedural History

The particular focus of this proceeding is a Court of Appeals decision from the Ninth Circuit that largely rejected assertions by Intertanko and intervenor below, the United States of America, that comprehensive federal standards

addressing tank vessel design, equipment, operations, personnel qualifications, training and manning preempt the State of Washington ("the State") from imposing regulations that propound divergent standards governing the same objects and subject matters.

Intertanko is an international trade association whose 280 members own or operate more than 2,000 tankers of U.S. and foreign registry. Some of these tankers call at ports in Washington State or transit through Washington State waters en route to destinations in other jurisdictions of the United States or Canada. (JA-25 to JA-28 and JA-30 to JA-33.)

The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331(a) and 1337(a), as these issues are a matter of federal question and concerned issues regulating commerce. On July 17, 1995, shortly after the BAP regulations became effective, Intertanko filed a complaint seeking injunctive relief and a declaratory judgment in the United States District Court for the Western District of Washington ("district court"). Specifically, Intertanko challenged sixteen of the BAP regulations. These regulations, in summary form, impose the following requirements on tank vessels, their owners, and their crews: submission of a detailed summary of any past (within five years) or future "events" involving the vessel (WAC 317-21-130); watch manning requirements for navigation, pilotage, security, anchor, and engineering watches throughout the vessel owner's fleet (WAC 317-21-200 Watch Practice Operating Procedures); navigational procedures while underway, preparation of detailed voyage plans, and navigation equipment check intervals (WAC 317-21-205 Navigation Operating Procedures); inspection intervals for engineering equipment and additional operational requirements (WAC 317-21-210 Engineering Operating Procedures); requirements for pre-arrival tests and inspections of all engineering, navigation, and propulsion systems aboard the

vessel (WAC 317-21-215 Operating Procedures — Pre-arrival tests & inspections); operating procedures for various shipboard emergencies (WAC 317-21-220 Emergency Operating Procedures); state control over vessel records for "events" in state waters (WAC 317-21-225 Record Retention Requirements); additional training qualifications beyond those required for obtaining a license or merchant marine document (WAC 317-21-230 Personnel training and qualifications); random, pre-employment, and post-accident drug and alcohol testing (WAC 317-21-235 Personnel policies — illicit drug and alcohol use); personnel performance review for any crew member serving on vessel in excess of six months (WAC 317-21-240 Personnel evaluations); work hour limitations and rest requirements (WAC 317-21-245 Personnel policies — work hours); common language and English language proficiency requirements for officers and crews (WAC 317-21-250 Personnel policies — language); maintaining crew training records on board the vessel (WAC 317-21-255 Personnel policies — record keeping); establishment of detailed inspection and safety programs (WAC 317-21-260 Management); installation of additional navigation equipment and bow and stern emergency towing systems on all tankers (WAC 317-21-265 Vessel Technology)[4]; submission of advance notice of vessel entry and safety reports regarding vessel operations (WAC 317-21-540). (JA-7, No. 106, filed 6/3/96, Intertanko's Memorandum in Support of Motion for Summary Judgment, at pp. 4-5.)

Intertanko's complaint alleged that a pervasive federal presence in all subject matters covered by the State's BAP regulations compelled a disposition invalidating the BAP regulations. Relying on the Supremacy Clause, the Commerce Clause and federal powers in the domain of

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4. These equipment requirements were deemed by the Court of Appeals to be invalid under this Court's decision of *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). (*See* Pet .App. A at 29a-32a.)

foreign affairs, Intertanko sought a declaration that the BAPs were unlawful and unenforceable against vessels operating in interstate and international commerce, and argued that their enforcement should be enjoined. (JA-2, filed 7/1/97, Brief for Appellant Intertanko at 5-6.) Additionally, Intertanko argued that the BAP regulations created constitutionally impermissible conflicts with international obligations of the United States, particularly given the considerable degree to which federal vessel and crew standards arise from or implement international agreements. (JA-2, filed 7/1/97, Brief for Appellant Intertanko at 65-67.) Intertanko cited express statements by the United States Coast Guard as evidence of federal preemptive intent and urged the district court to find both express and implied (field and conflict) preemption by federal authority as a basis for invalidating the BAP regulations. Finally, Intertanko contended that, because the State regulations necessarily required shipowners, crews and vessels outside the State of Washington and the United States to comply with their requirements in order to qualify for eventual admission to Washington waters, they resulted in an impermissible extraterritorial application of State power.

After oral argument on cross-motions for summary judgment, the district court concluded that all challenged state regulations were constitutionally valid, that no condition of field preemption existed with respect to any of the regulations, that the BAP regulations did not violate the Commerce Clause or impinge on the foreign affairs powers of the national government, and that the State was not unlawfully projecting its authority extraterritorially. The district court also concluded that express preemptive statements of the United States Coast Guard regulations were beyond the statutory authority of the Coast Guard. (Pet. App. B at 61a-63a.)

Intertanko filed a Notice of Appeal from the district court's decision with the Court of Appeals for the Ninth

Circuit. The United States of America intervened in support of Intertanko's position that BAP regulations were generally incompatible with federal requirements and international commitments. The Court of Appeals issued an Order on June 18, 1998, affirming in part and reversing in part. An amended opinion issued on August 31, 1998. The Court of Appeals found that WAC section 317-21-265, requiring certain navigation equipment and specialized towing equipment, was "virtually indistinguishable" from similar state requirements invalidated by this Court in *Ray v. Atlantic Richfield Co.*, 435 U.S. at 151, 160-61 (1978) (also referred to herein as "*Ray v. ARCO*" or "*Ray*"). (Pet. App. A at 30a-31a.) With regard to the remainder of the state regulations, however, the Court of Appeals held that the BAP regulations were not preempted either by this Court's analysis in *Ray*, or by regulations implemented by the Coast Guard. (Pet. App. A at 29a, 32a-38a.)

The Court of Appeals relied substantially on its view that section 1018 of the Oil Pollution Act of 1990 ("OPA 90" or "OPA") (33 U.S.C. § 2718) had significant non-preemptive effect that freed the states to engage in direct regulation of "operational" vessel activity. (Pet. App. A. at 23a and 27a-29a.) The Court deemed OPA section 1018 to be a reliable indicator that Congress intended to permit state regulation of tank vessels. The court further determined that OPA section 1018 rendered express preemptive statements by the Coast Guard in issuing regulations under federal vessel safety and marine environmental protection statutes beyond the "scope of [the Coast Guard's] congressionally delegated authority," citing this Court's decision in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). (Pet. App. A at 33a-34a.) The Court stated that section 1018 "demonstrates Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability, and compensation." (Pet. App. A at 22a.). The Court of Appeals found that OPA 90, "as the most recent statute in the field," and its

section 1018 savings provision reflect " 'the *full* purposes and objectives of Congress' " better than other federal statutes relied on by Intertanko and the United States. (Pet. App. A at 21a, quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (emphasis added).)

The Court of Appeals dismissed concerns of Intertanko and the United States that unilateral state deviations from federal and international standards undermined the foreign affairs role of the national government and the substantive content of the international agreements. In so doing, the Court of Appeals invoked its 1984 decision in *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), where it found that " 'international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction.' " (Pet. App. A at 23a.) The court also declined to consider arguments advanced by the United States that the State regulations further conflicted impermissibly with "innocent passage" elements of United Nations Convention on Law of the Sea ("UNCLOS") and the U.S./Canada Bilateral Agreement on the grounds that these issues were being raised for the first time on appeal. (Pet. App. A at 24a-25a.)[5]

Finally, the strong reliance of Intertanko on this Court's rationale of *Ray*, as compelling a field preemption conclusion invalidating Washington State rules that address federally-regulated elements of vessel "operations," "personnel qualifications," "training," and "manning" was rejected on the basis that *Ray*'s invalidation Washington State design, construction and equipment requirements was confined to design, equipment and construction and did not extend to

5. In seeking rehearing *en banc*, both Intertanko and the United States noted that these arguments had been raised by Intertanko in the district court action and were, in any event, cognizable by the Court of Appeals. (JA-5, No. 1, filed 7/17/95, Complaint at 3, 10-13 and 16-21.)

other elements (*e.g.*, operations, personnel qualifications, training, and manning) of Title II of the Port and Waterways Safety Act ("PWSA"). (Pet. App. A at 27a-28a, and n.11.) Washington State requirements were deemed by the Court of Appeals to be "operational" in nature and not subject to the reasoning of this Court's rejection of State design and construction and equipment requirements preempted under *Ray*.

Intertanko and the United States petitioned for rehearing and rehearing *en banc*. The Court of Appeals denied these requests on November 24, 1998. (Pet. App. C, Graber, J., dissenting). Intertanko and the United States filed Petitions for Certiorari to this Court on April 23, 1999. The Court granted those Petitions in an Order issued on September 10, 1999. The two petitions were consolidated for briefing and argument.

SUMMARY OF ARGUMENT

Marine safety and environmental protection are matters of explicit, traditional national concern. The Congress of the United States, acting pursuant to clear enumerated powers placed in its charge by the Constitution, actively has asserted for more than a century its authority to promulgate safety and environmental standards and requirements for vessels operating in the Nation's interstate and foreign commerce. The Congress directly regulates vessels as instrumentalities of interstate and international commerce. Congress has expressed its intent that vessel safety and marine environmental protection measures be uniform both in national and international contexts. The resulting federal regulatory structure is comprehensive, pervasive, and technically complex. The Congress has never indicated, either expressly or by implication, that it contemplates a joint or concurrent role for states and local governments in matters relating to standards and requirements affecting the on-board, primary conduct of tank vessels or their crews.

An extensive array of international agreements that address vessel safety and marine environmental protection issues complement the comprehensive federal maritime regulatory scheme. The United States is a party to many of these international agreements and has been a leader in advocating international adoption of strict safety requirements for vessels worldwide. Neither the Congress nor the Executive Branch of the national government has expressed qualifications or reservations to international treaties governing vessel safety and marine environmental protection that would permit local jurisdictions within this country to deviate from or modify the undertakings set forth in those treaties. Instead, the Congress and the federal agencies charged with implementing Congressional directions have expressed a clear and recurring expectation that effective protection of the national interests in safety and the environment of the nation's waterways requires a uniform national regime and a single decision maker that can speak for the country.

The reasoning of the Court of Appeals permits, at least within the Ninth Circuit, federal standards to be displaced within the boundaries of non-conforming states. Federal law ceases to be "supreme" and becomes dependent for its meaning and existence on the interpretations, activities, and forbearance of state governments acting unilaterally. National judgments governing vessel safety and environmental concerns thus are superseded within the boundaries of states with differing views. This is a constitutionally repugnant result.

From the commencement of this litigation in federal district court, neither the State of Washington nor its supporters have argued that the State's vessel regulations lie outside the subject matters or content of federal statutes and regulations relied on by Intertanko or that the State regulations escape preemption because they fall within a void of federal regulation. Instead, the State argued, and the Court

of Appeals largely agreed, that a savings provision in the Liability and Compensation title of the Oil Pollution Act of 1990 (section 1018, 33 U.S.C. § 2718) reflects an intent of Congress to authorize the states and localities to impose what the State describes as "more stringent oil spill prevention measures" including the vessel and crew-specific regulations challenged by Intertanko. *See* State Respondents' Brief in Opposition to Petitions for Certiorari at 20. Intertanko submits that reliance on this savings provision has distorted dramatically virtually every aspect of the lower courts' constitutional analysis. The function of section 1018 within the Oil Pollution Act of 1990 is, importantly but strictly, to preserve at all levels of government — federal, state and local — preexisting authority to impose penalties, fines or liabilities relating to oil discharges from vessels and all other facilities or installations.

The reasoning and holding of the Ninth Circuit in the case below, if extended to other coastal states, create the prospect of vessels that meet in all respects every applicable federal and international safety and marine environmental protection standard being barred from or criminally penalized for participating in the interstate and foreign commerce of the United States within any state willing to depart from the federal structure of regulation. Such a result is as constitutionally inadmissible now as it was at the commencement of the Republic under the Constitution.

ARGUMENT

Intertanko challenges on federal constitutional principles the enactment and enforcement by the State of Washington of a vessel safety and marine environmental protection program that imposes on vessels and their crews requirements and standards that differ from applicable federal requirements. (JA-7, No. 106, filed 6/3/96, Plaintiff Intertanko's Memorandum in Support of Motion for Summary Judgment at 28-48.) The matter is unusual in that there is but one reported prior case where a state or local

government has attempt to act directly on maritime regulatory subject matters so prominently and extensively occupied by the federal government. *See Ray v. ARCO*, 435 U.S. 151 (state regulation of vessel design, construction and equipment features invalidated).[6] In that case, all elements of the State of Washington's earlier efforts to interpose its own standards on subjects of mandatory federal vessel regulation were held unlawful by this Court. Since *Ray*, there has been a substantial expansion of the scope and complexity of federal standards and requirements governing tank vessels. The holdings and rationale of *Ray* compel a renewed vindication of federal capabilities for ensuring the safety and environmental protection of the nation's waterways.

It is not uncommon that this Court has reviewed controversies concerning the effect of federal regulatory standards on state causes of action, remedies or other state interests.[7] It is far less common that the Court is presented,

6. Other instances in which States or local governments have been permitted to regulate vessel-related activities in the absence of a federal rule include dispositions from the Ninth Circuit in *Barber v. Hawaii*, 42 F.3d 1185 (9th Cir. 1994); *Beveridge v. Lewis*, 939 F.2d 859 (9th Cir. 1991); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), *cert. denied sub nom., Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140 (1985). Intertanko regards these cases as distinguishable from the case at bar because the contested state or local activity was directed to areas in which there was no clear federal presence. *Chevron* is a troubling case, the holding of which can only be reconciled with Intertanko's understanding of the law if it is confined to the principle that vessel discharges (*i.e.*, actual releases of pollutants) onto state waters are subject to state regulation under "shared federalism" principles of the Clean Water Act and are segregable from on-board vessel subject matters governed by the Port and Waterways Safety Act.

7. Within the maritime field alone, federal courts have been called upon to review, *inter alia*, preemption issues involving state licensing (*Gibbons v. Ogden*, 9 Wheaton (22 U.S.) 1 (1824); pilotage (*Cooley v. Board of Port Wardens*, 12 Howard (53 U.S.) 299 (1852)); (Cont'd)

as it is here, with so stark a coincidence of subject matters, objects and purposes of federal and state requirements and standards. Sixteen state regulations addressing crew and vessel standards were challenged by Intertanko. Each of the sixteen regulations corresponds directly with federal vessel standards addressing the same subjects. (*See* Pet. App. K at 349a-353a.) Such state standards and requirements unilaterally substitute their requirements for legitimate judgments of the federal government that are intended to have nationwide application.

Express preemptive statements of the United States Coast Guard, the agency charged with administration of federal vessel safety and marine environmental protection programs, preempt the State regulations. Prior decisions of this Court that have recognized the implicitly preemptive nature of the federal statutes that impose standards for vessel safety and marine environmental protection. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151; *Kelly v. Washington ex rel Foss Co.*, 302 U.S. 1 (1937). Finally, the extensive international content of federal vessel safety and marine environmental protection standards that flows into the corpus of federal law by U.S. accession to international treaties and conventions compels deterrence of unilateral non-federal departures from the agreed upon standards, requirements and procedures of those

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local mooring and anchorage restrictions (*Barber v. Hawaii*, 42 F.3d 1185 and *Beveridge v. Lewis*, 939 F.2d 859; tugboat safety inspections (*Kelly v. Washington ex rel Foss Co.*, 302 U.S. 1 (1937)); remedies available to maritime workers for death or injury (*Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917)); municipal restrictions on air pollution from vessels (*Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960)); enforcement of maritime contracts (*Kossick v. United Fruit Co.*, 365 U.S. 731 (1961)); and applicability of state *forum non conveniens* concepts in maritime-related civil litigation (*American Dredging Co. v. Miller*, 510 U.S. 443 (1994)).

undertakings. The power of the national government to commit the nation as a whole to adherence to international accords is illusory if those undertakings have meaning and effect only until abandoned or modified by individual states.

Prior to the case at bar, rare and scattered instances of local governments asserting regulatory jurisdiction over vessel-related subject matters have been permitted only in the voids or on the outer periphery of federal programs. *See, e.g., Ray v. ARCO*, 435 U.S. 151 (state tug escort requirement permitted in absence of federal regulations); *Huron Portland Cement v. City of Detroit*, 362 U.S. 440 (1960) (municipal smoke abatement restrictions applied to vessels); and *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1 (1937) (state inspection of motor-driven tugs permitted where no federal inspection requirement existed). In this matter, however, petitioners Intertanko and the United States bring to the Court's attention an instance in which the federal judiciary has permitted a state government to impose regulations that directly coincide with on-board subject matters and legislative purposes of federal statutes governing vessel safety and marine environmental protection, matters of explicit, historic national concern.

For the Supremacy Clause to have meaning and effect in the field of vessel safety and marine environmental protection, there cannot exist differing state requirements governing the same subjects and purposes when the federal government has acted pursuant to constitutionally-enumerated powers. The applicable general rule governing such overlap of state and federal authorities in on-board maritime subject matters clearly within the competence of the federal government to regulate, is that the state rule must give way. The field of vessel safety and marine environmental protection is preempted.

The purposes and subject matter of federal regulation are manifest. The structure and content of federal programs are pervasive and incompatible with divergent local

initiatives. Uniformity of standards on both national and international levels is frequently identified as a national objective. The Nation must be able to address complex industrial issues affecting maritime safety and the environmental protection forcefully at home and abroad. Intertanko therefore submits that none of the challenged elements of State incursion into on-board safety requirements heretofore regulated exclusively by the federal government can be countenanced.

Exceptions to the necessarily dominant federal role are few and well-marked. Express Congressional authority to the states can be found in the areas of pilotage (46 U.S.C. § 8501)[8] and recreational boating safety and registration (46 U.S.C. chs. 121, 125 and 131). States also may act in vessel traffic safety subject matters for which the Congress has left discretion to federal authorities if those authorities (in this instance, the United States Coast Guard) have not exercised such discretion. *Ray*, at 435 U.S. at 171-72. No such subject matters are at issue here.

I. THE CONSTITUTION EXPRESSLY GRANTS POWERS TO THE FEDERAL GOVERNMENT TO REGULATE MARITIME ACTIVITY BETWEEN THE STATES AND WITH FOREIGN NATIONS — WHEN THE NATION SO ACTS, ITS ACTIONS ARE SUPREME AND CANNOT BE MODIFIED BY UNILATERAL STATE OR LOCAL ACTION

Maritime commerce among the states and with foreign nations has been a central, overriding concern of the federal government since its inception. Interference with commerce between the states under the Confederation led quickly to widespread calls for a national government with clear authority to impose uniform requirements for interstate and

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8. The pilotage exception is one of venerable origins, having been enacted by the First Congress of the United States. Act of August 7, 1789, 1 Stat. 54.

international commerce.[9] At that time, of necessity, virtually all international commerce was maritime. Many of the great controversies of the early years of the Republic related to use of and access to the seas for purposes of commerce and defense. The substantial presence of the national government in matters relating to waterborne interstate and international commerce has since been exercised largely without contest or conflict from local governments.

In the public debates over the desired characteristics of post-Confederation national government, Alexander Hamilton addressed the need for placing maritime matters squarely in the cognizance of the federal judiciary:

> The most bigoted idolizers of State authority, have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.[10]

Within the Constitution, this concern that interstate and international commerce be regulated by the national government appears repeatedly. Article I, section 8 places

9. "The entire purpose for which the delegates assembled at Annapolis, was to devise means for the uniform regulation of trade." *Gibbons v. Ogden*, 9 Wheaton (22 U.S.) 1, 15, (1824) (syllabus of argument by Mr. Webster.)

10. ***The Federalist* No. 80 (Alexander Hamilton) (McLean's Edition, NY)**. Although Hamilton here addressed the necessity of the judiciary to promote a uniform body of admiralty and maritime law under provisions enshrined in Article III, § 2, Clause 1 of the Constitution, we cite the sentiment here to support our view that the demands of maritime commerce were central elements of early constitutional judgments about the necessity of a strong federal role and that the commerce, foreign affairs and admiralty provisions of the Constitution reflected a purpose to invest all three branches of the federal government with responsibility for national, not sectional or local, approaches to maritime commerce.

with the national government the power to "lay and collect Taxes, Duties and Imposts" on a uniform basis throughout the United States. This power is joined in the same section with the express authority to "regulate Commerce with foreign Nations, and among the several States . . ." and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. Const. Art. I, Section 8, Clauses 1, 3, and 18. Article I also forbids non-uniform "Regulation of Commerce or Revenue" as between ports in the several states. U.S. Const. Art. I, Section 9, cl. 6.[11] Under Article III, the judicial power of the United States is extended "to all Cases of admiralty and maritime Jurisdiction. . . ." U.S. Const. art. III, § 2.

These express powers, in the aggregate, define a vigorous national government distinguished from its immediate predecessor in its ability to promote a strong navy and merchant marine (*The Federalist*, No. 11 (Alexander Hamilton)), and to ensure a strong national and international commercial environment. It has been clear from the beginning that "All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation." *Gibbons v. Ogden*, 9 Wheaton (22 U.S.) 1 at 191. It is similarly clear that vessels are regulated as instruments of that commerce: "Vehicles of Commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by national legislation." *Japan Line, Ltd. v. County of Los Angeles*, 441

11. This provision also forbids state requirements that ". . . Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." Although the State of Washington is not exacting "duties" in a customs sense, the record in the district court establishes that vessels from the high seas bound to Oregon ports on the Columbia River, a waterway the navigable channel of which lies within the borders of both Oregon and Washington, are being boarded and inspected in Oregon by Washington State officials to confirm compliance with the disputed Washington State BAP regulations. Affidavit of Miles Kulukundis, at JA-26.

U.S. 439, 449 (1979) (quoting *Railroad Co. v. Maryland*, 21 Wallace (88 U.S.) 456, 470 (1875)).

The characteristics of maritime trade and operations lead to express recognition of the value of uniformity in maritime matters. The federal national interest in maritime commerce "can be fully vindicated only if all operators of vessels or navigable waters are subject to uniform rules of conduct." *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982). The value of uniformity is obvious:

> The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the states may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare.

State of Washington v. W.C. Dawson & Co., 264 U.S. 219, 228 (1924).

A. The Federal Statutory And Regulatory Scheme Governing Vessel Safety And Marine Environmental Protection Is Pervasive, Comprehensive, Complex And Largely Non-discretionary. It Is Intended By The Congress And Deemed By This Court To Be Preemptive In Its Design And In Its Operation

Throughout our history, the federal government of the United States has imposed safety and environmental protection standards on vessels. U.S. Const., Art. I, Section 8, cl. 3. Federal inspection laws intended to prevent boiler explosions were first imposed in 1838. These safety and inspection provisions were extended in 1852, 1864 and 1871. H.R. Rep. No. 338, 98th Cong., 1st Sess. 136-137, *reprinted in* 1983 U.S.C.C.A.N. at 948-949, 97 Stat. 500. Federal legislation directed specifically at tank vessel safety was enacted in 1936 (The Tank Vessel Act, Rev. Stat. § 4417a,

ch. 729, 49 Stat. 1889, codified as amended at 46 U.S.C. § 391a). The requirements of that Act were extensively enlarged and amended in 1972 with the passage of the PWSA, the federal statute here principally relied on by Intertanko as indicative of a preemptive federal presence in the field of vessel safety and marine environmental protection. Among the expressly identified purposes of the PWSA is to provide ". . . increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." 46 U.S.C. § 3703(a). The subject matters (on-board operational, personnel qualification and training requirements for tank vessels) and purposes (safety and environmental protection) define a field of federal activity in which the State of Washington now wishes to participate.

The PWSA, as amended, is part of an extensive body of marine safety and environmental protection requirements and standards that includes regulations issued by the United States Coast Guard pursuant to delegation from the Secretary of Transportation, and a comprehensive set of international maritime safety and environmental treaties. All of these federal sources of tank vessel regulation are "the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. Given the mobile and international nature of the maritime industry, this body of law depends on both national and international uniformity and coordination for its effective operation. This Court in *Ray v. ARCO* found the content of the entirety of the PWSA to be strongly preemptive of state action. *See Ray*, 435 U.S. at 164-68 & n.15.

The PWSA contains two titles. Title I, now located at 33 U.S.C. §§ 1221-1236, permissively authorizes ("the Secretary may . . .") the Secretary of Transportation to establish vessel traffic control systems, to restrict operation of tankers not having specified capabilities, and to negotiate international treaties on vessel safety. Title II of the PWSA employs mandatory language that requires ("the Secretary

shall . . .") the Secretary to adopt uniform federal regulations for tanker design, construction, equipment, operation, personnel qualifications, manning and training. *See* 46 U.S.C. § 3703 *et seq*. The Secretary of Transportation's obligations under this statute have been delegated to the United States Coast Guard pursuant to 46 U.S.C. § 2104.

The distinction between the discretionary subject matters of Title I, subject matters Intertanko contends are not directly implicated in this litigation, and the mandatory requirements of Title II, subject matters we posit to be central to this case, was addressed by the Court in its 1978 *Ray* decision. In *Ray*, the Court assessed prior efforts by the State of Washington to assert regulatory jurisdiction over tank vessel subject matters already governed by federal regulations. The decision struck down all Washington State vessel regulations then at issue. Those regulations invaded Title II PWSA federal subject matters of design, construction, and equipment requirements. *Ray*, 435 U.S. at 164-171, 173-178. Importantly, the Court in *Ray* let stand only a State pilotage requirement governed by the venerable and express pilotage exception of 46 U.S.C. § 8501 (*see* n.8, *supra*) and the State's tug escort requirements that were deemed within Title I PWSA discretionary subject matters:

> . . . the relevant inquiry *under Title I* with respect to the state's power to impose a tug-escort rule is thus whether the Secretary has either promulgated his own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all.

Ray, 435 U.S. at 171, 172 (emphasis added). Finding that no federal regulations governing tug escorts had been promulgated at the time the case was decided, the Court remarked that "[i]t may be that rules will be forthcoming that will pre-empt the State's present tug-escort rule, but until that occurs, the state's requirement need not give way under

the Supremacy Clause." *Ray*, 435 U.S. at 172.[12] The Court thus confirmed that, in the absence of a federal rule, the State's tug escort regulations could operate until such time as the cognizant federal agency acted to assert its discretion. *Id.*

Every state regulation challenged here falls within the meaning of mandatory Title II subject matters (operations, personnel qualifications and manning).[13] Intertanko has yet to discern any attempt by the State or its supporters to argue that the State is acting in a vacuum of federal action under Title I of PWSA.

Significantly for the supremacy and preemption analysis here, the PWSA authorized the Coast Guard to establish minimum safety standards for structures on navigable waters, but expressly preserved to the states authority to promulgate higher safety equipment requirements for structures than those established by the Coast Guard. *See* 33 U.S.C. § 1225(b); *see also Ray*, 435 U.S. at 164-171, 173-178. This express grant of authority to states is limited to structures only. *Id.* This Court observed in *Ray* that the effect of this provision was to "impliedly forbid higher state standards for vessels." *Ray*, 435 U.S. at 174. This implied prohibition remains valid and controlling.

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12. This disposition is consistent with the Court's pre-PWSA approach to Washington State motor tugboat inspection requirements in *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1 (1937). There the Court permitted the State to operate in a vacuum of federal regulation (federal inspections then applied only to steam-driven tugs), but cautioned that had the State attempted "to impose particular standards as to structure, design, equipment *and operation*," the State would "encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule." *Kelly*, 302 U.S. at 15 (emphasis added).

13. The particular BAP regulation governing vessel design, equipment and technology was found unlawful by the Court of Appeals and is, therefore, not addressed in this petition.

Since *Ray*, the subject matters and breadth of tank vessel regulations and requirements mandated by Congress have expanded dramatically. This Court's opinion in *Ray* was issued the same year that the Port and Tanker Safety Act ("PTSA"), Pub. L. No. 95-474, 92 Stat. 1471 (1978) substantially enlarged the vessel safety and marine environmental protection provisions of the PWSA. The PTSA retained the pre-existing vessel safety and environmental protection core of PWSA, but added substantially to its provisions. Mandatory subjects of federal regulation were expanded to include personnel qualifications, manning, and training requirements for U.S. and foreign tankers operating in U.S. waters.

As enlarged by PTSA, broad authority is imparted to the Secretary to regulate tankers. Chapter 37 of Title 46 addresses carriage of dangerous liquid bulk cargoes, including oil, by commercial vessels. Section 3703(a) now expressly directs that the Secretary:

> shall prescribe regulations for the design, construction, alteration, repair, maintenance, *operation*, equipping, *personnel qualification*, and *manning* of vessels to which this chapter applies, that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment.

46 U.S.C. § 3703(a) (emphasis added). The subject matters of the remaining disputed State of Washington tank vessel regulations directly correspond to the subject matters emphasized above. PWSA additionally requires the establishment of minimum standards for self-propelled tankers (46 U.S.C. § 3708), and requires foreign vessels to show evidence of compliance with Chapter 37 and regulations prescribed thereunder (46 U.S.C. § 3711). Other pertinent provisions of Title 46 include: (1) Part D, which requires the Secretary to establish procedures for reporting

and investigating marine casualties; (2) Part E, which governs personnel licensing and qualifications and (3) Part F, which authorizes the Secretary to control vessel manning requirements.

Section 9101 of Title 46 establishes standards for foreign tank vessels, and directs that the "*Secretary shall* evaluate the manning, training, qualification, and watchkeeping standards of a foreign country that issues documentation for any vessel to which chapter 37" of Title 46 applies. 46 U.S.C. § 9101 (emphasis added). Thus, Congress has expressly authorized the Secretary of Transportation of the United States to determine whether a country has failed to maintain or enforce standards at least equivalent to those required by the United States or international standards accepted by the United States. *Id.* No other official, federal, state or local, has been so charged by the Congress.

In 1983, for the stated purpose of establishing one clear and concise scheme of marine safety laws, Congress enacted Subtitle II of Title 46, United States Code, ("Shipping"), Pub. L. No. 98-89, 97 Stat. 500 (1983), as amended. This codification included existing provisions of Title II of PWSA. Under Title 46, the Secretary of Transportation is accorded broad powers of superintendence over the U.S. Merchant Marine and is authorized to prescribe regulations to carry out the provisions of the law. 46 U.S.C. § 2103. The discretionary elements of Title I of PWSA remain uncodified and are now located in Title 33 of the United States Code ("Navigable Waters"). Congress has enacted various other amendments to Title 46, the most recent in 1998. *See* Coast Guard Authorization Act of 1998, Pub. L. No. 105-383, 112 Stat. 3411 (codified in scattered sections of 46 U.S.C.).

The process of enlarging the extent and complexity of Title 46 continued in 1990 when Congress enacted additional changes to Title 46 in the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990). Title IV of OPA 90 ("Prevention and Removal") expanded yet again the

already substantial federal presence in the field of tank vessel design, construction, personnel, equipment and operations with explicit mandates to the Secretary of Transportation to promulgate new marine safety and environmental regulations.[14] These provisions, once enacted, were lodged in Title 46 along with the vessel safety and environmental protection provisions of PWSA.

In addition to these statutes, there exists a vast network of federal regulations implementing both federal statutes and international treaty requirements.[15] Many of these regulations governing federal subject matters of design, construction, operations, personnel qualifications and training, manning and management practices were accompanied, when promulgated, by express preemptive statements declaring a federal judgment that State action is precluded. Examples of these preemptive statements by the United States Coast Guard were included in the appendix to Intertanko's Petition for a Writ of Certiorari. (Pet. App. H, 269a-290a.) Intertanko relied below, and continues to rely here, on these express

14. Title IV OPA 90 amendments require the Secretary of Transportation to act in matters including: mandatory review of alcohol and drug abuse and other matters in issuing licenses and merchant mariners' documents (OPA § 4101); renewal periods for licenses and documents (OPA § 4102); suspension and revocation of licenses and documents for alcohol and drug abuse (OPA § 4103); manning standards for foreign tank vessels (OPA § 4106); vessel traffic systems (OPA § 4107); periodic gauging of plating thickness of tankers (OPA § 4109); overfill and tank level or pressure monitoring devices (OPA § 4110); study of tanker navigation safety standards (OPA § 4111); tank vessel manning (OPA § 4114); double hull construction for tank vessels (OPA § 4115); and pilotage criteria (OPA § 4116). Elements of OPA dealing with liability and compensation, including section 1018's non-preemptive language were codified in Title 33 ("Navigation and Navigable Waters"), while provisions addressing vessel design, operation, equipping, personnel qualification and manning specifically amended Title 46. (Pet. App. F at 222a-261a.)

15. *See* n.3, *supra*.

preemptive statements as compelling indication that state action is barred in these federally regulated subject matters.

B. The Federal Statutory Regime Governing Vessel Safety And Marine Environmental Protection Is Closely Integrated With And Derived From International Vessel Safety And Marine Pollution Control Standards And Requirements

A unique feature of federal law governing vessel safety and marine environmental protection is its close integration with comprehensive vessel standards established through international agreements with other maritime nations.[16] Throughout this century, the United States and other leading maritime nations have promoted the establishment of internationally accepted uniform marine safety and marine environmental protection standards. These international commitments, once agreed to by the federal government, are

16. An analogous national and international approach driven by similar considerations is found in the field of civil aviation. *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 119 S. Ct. 662, 671 (1999) (interpreting Warsaw Convention to be preemptive of State actions where claim does not meet Convention's liability requirements); and *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 638-39 ("pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls.") and stating that interdependence of safety and efficiency standards "requires a uniform and exclusive system of federal regulation if the Congressional objectives underlying the Federal Aviation Act are to be fulfilled."; *Schaeffer v. Cavallero*, 29 F. Supp. 2d 184, 185 (S.D.N.Y. 1998) (finding that "[I]n keeping with the federal government's paramount interest in regulating aviation, all state laws must be interpreted consistently with this over-riding federal law.") (citing to *Northwest Airlines Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring); and *Abdullah v. American Airlines, Inc.*, 969 F. Supp. 337, 344-348 (D.V.I. 1997) (discussing at length "pervasive regulation" of aviation safety as preempting state laws concerning uniform regulation and noting exception for personal injury claims).

subsumed into the corpus of federal statutes and regulations by operation of Article VI of the Constitution and by the practical necessity of conforming U.S. requirements and procedures to those committed to in international agreements. Title 46, for example, contains several provisions concerning international marine safety and environmental protection requirements. This reflects the necessity of implementing these standards in an atmosphere of international comity and reciprocity.[17]

This Court noted in *Ray* that there existed a "decided congressional preference for arriving at international standards for building tank vessels." *Ray*, 435 U.S. at 166. The Court cited legislative history of the PWSA to indicate a preference for international approaches to other Title II PWSA subject matter areas such as vessel maintenance and operation: "multilateral action with respect to comprehensive standards for the design, construction, maintenance and operation of tankers for the protection of the marine environment would be far preferable to unilateral imposition of standards." S. Rep. No. 724, 92d Cong., 2d Sess. At 23 (1972) *reprinted in* 1972 U.S.C.C.A.N. 2766, 2783 (cited in *Ray*, 435 U.S. at 167, n.16).

For the preemptive positions of Intertanko and the United States to prevail in this cause, it should not be necessary for petitioners to show that the international vessel safety and

17. *See, e.g.*, 46 U.S.C. § 3303(a) ("A foreign country is considered to have inspection laws and standards similar to those of the United States when it is a party to an International Convention for Safety of Life at Sea to which the United States is currently a party"); and 46 U.S.C. § 3711 ("The Secretary may accept any part of a certificate, endorsement, or document issued by the government of a foreign country under a treaty, convention, or other international agreement to which the United States is a party, as a basis for issuing a [U.S.] certificate of compliance"); *see also* 46 U.S.C. § 5109 (extending reciprocity under International Convention of Load Lines); and 46 U.S.C. § 14306 (extending reciprocity under International Tonnage Convention).

pollution prevention regime is perfect in its design or execution.[18] The Congress and other elements within the United States government have on occasion expressed impatience or reservations about the pace of development of international vessel safety standards. The legislative history of PTSA reflects considerable discussion of the interrelationship between federal vessel standards and the desirability of promoting international solutions to vessel safety and marine pollution prevention issues. Nonetheless, the multi-national nature of the marine industry and the mobility of vessels dictate that there be a high degree of international cooperation in maintaining vessel safety standards. When the appropriate elements of the national government of the United States have negotiated, agreed to and ratified these international undertakings, they are taken into the body of federal law and enjoy with purely domestic enactments the status of "supreme Law of the Land" by virtue of Article VI of the Constitution. Because international maritime agreements describe a complex system of controls exercised both by the nations in which vessels are registered ("flag states") and nations at whose ports the vessels call ("port states"), federal law governing vessel safety and

18. The State and its supporting intervenors have countered reliance by Intertanko and the United States on international agreements by criticizing the effectiveness of the international safety and pollution control regime. These criticisms, even if deemed valid for purposes of argument, are quite beside the fundamental constitutional point of whether the federal government can commit the nation as a single entity to a uniform approach to marine safety. While treaties may not always or perfectly achieve their objectives, the power to make policy on matters of national interest is a "national one from the compulsion of both necessity and our Constitution." *Kolovrat v. Oregon*, 366 U.S. 187, 198 (1961) (referring to currency exchange policies). Once the national government has addressed a policy concern for the country as a nation, the states cannot abridge treaty rights because of concern "that valid international agreements might possibly not work completely to the satisfaction of state authorities." *Id.* at 198.

marine pollution prevention must conform in a number of ways to established international controls on vessel safety and quality standards.[19]

While the array of international agreements and treaty commitments to which the United States is a party and that affect vessel safety and marine environmental protection is quite broad, Intertanko's preemption arguments to the courts below have largely focused on four international agreements: the International Convention for the Safety of Life At Sea, 1974 ("SOLAS") and its amendments;[20] the International Convention for the Prevention of Pollution from Ships, 1973 and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships ("MARPOL 73-78");[21] the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers ("STCW") and 1995 amendments thereto;[22] and the Convention on the International Regulation for Preventing Collisions At Sea, 1972 ("COLREGS").[23] These four conventions cover the domain of subject addressed by the challenged State vessel regulations and establish an international system of standards, certifications, inspections, and reciprocal treatment that is immediately damaged if state, provincial or local governments act in ways contrary to the obligations of the national government signatories.

There are a number of additional international agreements, both bilateral and multi-lateral, which fortify Intertanko's claim here that the subject matters of the challenged Washington State regulations are heavily freighted with functions and commitments that can only be undertaken by the national government of the United States

19. *See* n.17, *supra*.

20. 32 U.S.T. 47, T.I.A.S. No. 9700.

21. 17 I.L.M. 546.

22. S. Treaty Doc. No. 96-1, C.T.I.A. No. 7624.

23. T.I.A.S. No. 8587, *reprinted in* 12 I.L.M. 734 (1973).

acting not only pursuant to its powers to regulate commerce, but also through exercise of its foreign affairs authority. Among these additional agreements that define profoundly multi-national safety and pollution prevention regime are the United Nations Convention on the Law of the Sea ("UNCLOS"), bilateral agreements between the United States and the Government of Canada concerning vessel traffic management in the waters along the international boundaries between those two nations, particularly in the Straits of Juan de Fuca, and any number of bilateral friendship, commerce and navigation (FCN) treaties between the United States and other maritime nations. These FCN treaties typically guarantee to the signatory parties that vessels and other instrumentalities of bilateral commerce will be granted reciprocal treatment no less favorable than that accorded to other similarly situated nations.[24]

The constitutional point of directing the Court's attention to the substantial degree to which vessel regulatory standards are governed by international commitments of the national government of the United States is that such commitments are well within the enumerated powers of the federal government; that such agreements, once ratified, become the Supreme Law of the Land; that the decisions by the national government to pursue and to accede to such undertakings reflect, of necessity, a constitutional reconciliation of local and national objectives by the federal authorities authorized to make such judgments; and that such commitments do not permit state and local governments to disregard national decisions because they happen to have other ideas about optimal approaches to regulatory issues.

24. International maritime agreements are discussed in detail by Professor Craig Allen in his four volume article concerning federalism. *See* Craig H. Allen, *Federalism in The Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. of Mar. L. and Com. 565-613 (1998).

The Supremacy Clause leaves no doubt that U.S. treaty provisions are "the supreme Law of the Land." No lesser status attaches to international conventions governing vessel safety and marine environmental protection conventions. State law must give way "when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement." *United States v. Pink*, 315 U.S. 203, 230-231 (1942).

II. THE CONTENT, MECHANICS, SUBJECT MATTERS, AND SCOPE OF FEDERAL VESSEL SAFETY AND MARINE ENVIRONMENTAL PROTECTION PROGRAMS REFLECT AN INTENT OF THE NATIONAL GOVERNMENT THAT FEDERAL LAW BE EXCLUSIVE; STATE EFFORTS TO REGULATE VESSEL OPERATIONS, PERSONNEL QUALIFICATIONS, TRAINING AND MANNING ARE PREEMPTED

Intertanko has approached preemption analysis in this matter from the perspective that the implied preemption analysis of *Ray* compels invalidation of Washington State's resurgent efforts to regulate in Title II, PWSA subject matters or Title I subject matters in which a federal presence has been established. Additionally, there now exists a considerable body of express preemptive utterances by the United States Coast Guard that did not exist when *Ray* was decided. Because of its view of section 1018 of OPA 90, the Court of Appeals dismissed these express preemptive statements as beyond the lawful authority of the Coast Guard. We submit that section 1018 supports no such conclusion and that, if this element of error is rectified, Coast Guard preemptive statements must be given substantial controlling weight.

A. The Coast Guard Has Spoken With Express Preemptive Effect On Marine Safety Regulations. The Court Of Appeals Erred In Rejecting These Statements As Being Outside Lawful Coast Guard Authority

Not only has the scope, content and complexity of federal marine safety and environmental protection programs expanded since *Ray*, the federal government has also added to the preemptive atmosphere surrounding its programs through direct preemptive statements. The absence of such statements compelled an implied field preemption analysis in *Ray*. Preemptive qualities of more extensive federal programs are now even more apparent than in 1978. Where express federal preemption exists, implicit preemptive analysis is unnecessary.

A federal agency, acting through its rulemaking processes, can effect preemption of state law. *See Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982). That the Coast Guard is entrusted by Congress with administration of a complex and comprehensive regulatory regime is evidence in itself of preemptive intent. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959). Moreover, the Coast Guard's own opinion as to the degree of preemption inherent in a statute is of value to the Court in determining whether state action is ousted. *See Farmers Educational & Co-operative Union v. WDAY, Inc.*, 360 U.S. 525, 532-33 (1959). It is sufficient to establish preemption that the agency acted within its delegated authority and that the agency itself intended to preempt. *See De La Cuesta, supra*, 458 U.S. at 154.

The Coast Guard has declared a number of BAP Regulation subject matters to be within the exclusive competence of the federal government. In each instance, the Coast Guard has stated that its regulations have preemptive effect, citing the need for uniformity or standardization.

B. Coast Guard Pre-emptive Statements Address Manning, Navigational Safety, Drug And Alcohol Testing, And Operational Requirements; These Statements Compel State Regulations In The Same Subject Matters To "Give Way"

When issuing federal regulations requiring that each tanker underway have an engineering watch and that a tanker navigate with two licensed deck officers on watch on the bridge, the Coast Guard stated "it is a well-settled principle that regulations concerning manning of commercial vessels in U.S. waters are the exclusive domain of the U.S. Coast Guard . . . the Coast Guard intends the manning provisions to preempt State action addressing the same subject matter." *See* 58 Fed. Reg. 27,628 at 27,632 (May 10, 1993); *see also* 57 Fed. Reg. 45,664 at 45,667 (Oct. 2, 1992) (prop. rule); and 57 Fed. Reg. 12,378 at 12,379 (Apr. 9, 1992) (prop. rule). (Pet. App. H at 270a-275a.) This preemptive utterance invalidates BAP Regulation 317-21-200.

In 1994, the Coast Guard issued regulations concerning procedures for the operation and testing of steering gear. In promulgating the requirement on operation of steering gear for vessels underway, the Coast Guard stated that it intended to oust State action: ". . . the Coast Guard intends to preempt State or local laws on the navigational safety of these vessels." *See* 60 Fed. Reg. 24,767 at 24,771 (May 10, 1995). (Pet. App. H at 286a.) The Coast Guard thus expressly preempted state or local action in the subject matters of BAP Regulation 317-21-210 as well as other BAP Regulations that address operations and navigational safety (*e.g.*, WAC 317-21-200 (Watch Practices) and WAC 317-21-205 (Navigation)).

In 1993 and 1995, the Coast Guard issued various rules regarding uniform federal regulation of drug and alcohol testing. In each of these the Coast Guard spoke preemptively: "The authority to require programs for chemical drug and alcohol testing of commercial vessel personnel has been

committed to the Coast Guard by Federal statutes." *See* 58 Fed. Reg. 68,274 at 68,277 (Dec. 23, 1993). (Pet. App. H at 287a.) Federal statutes and regulations "preempt State and local regulations regarding drug testing programs requiring the testing of employees on-board U.S. vessels." *Id.*[25] These statements expressly preempt state actions in subject matters addressed by BAP Regulation 317-21-235.

On July 30, 1996, in a final rule mandated by OPA concerning operational measures for single hull tank vessels, the Coast Guard stated that it regarded federal operational rules as "preeminent." 61 Fed. Reg. 39,772-73 (1996). The Coast Guard regulations relate to, among other things, bridge resource management, and accordingly preempt state action on subject matters addressed by BAP Regulations 317-21-200, -205, -210, -215, and -220.

In a 1995 notice of proposed rulemaking to amend federal regulations to allow for alternative means to comply with vessel regulatory standards, the Coast Guard stated that:

> The authority to regulate safety requirements of U.S. vessels is committed to the Coast Guard by statute. Furthermore, since these vessels tend to move from port to port in the national market place, these safety requirements need to be national in scope and avoid numerous, unreasonable and burdensome variances. Therefore, this action would preempt State action addressing the same matter.

60 Fed. Reg. 32,480 (1995) (CR 106 at Exh. 5(F)); *see also* 61 Fed. Reg. 68,517 (1996) and 62 Fed. Reg. 17,020 (1997) for identical or similar statements. These statements establish the Coast Guard's express preemption of

25. The Coast Guard has repeated this preemption statement on several occasions using identical or virtually identical language. *See* 60 Fed. Reg. 67,062 at 67,063 (Dec. 28, 1995); 58 Fed. Reg. 31,104 at 31,106 (May 28, 1993). (Pet. App. H at 284a and 289a, respectively.)

Washington's general asserted authority to regulate and inspect vessels pursuant to RCW 88-46-040. More fundamentally, these statements by the Coast Guard manifest a condition of express preemption that compels summary invalidation of BAP Regulations that address the subject matters identified by the Coast Guard.[26]

C. The Implied Preemption Analysis Of Ray Compels A Determination That State Regulations Are Unlawful

In addition to the preemptive impact of express statements by the federal government, the entirety of the State regulations here under attack are subject to an implied preemption analysis both because the field is occupied by federal actions and because the State regulations impermissibly conflict with federal purposes and objectives.

To the extent that any element of the State's regulatory program survives the impact of the express preemptive statements of the Coast Guard, *Ray*'s analysis under the Supremacy Clause sweeps before it all elements of the State BAPs that correspond to Title II PWSA mandatory subject

26. A legal opinion from the Chief Counsel of the Coast Guard, Rear Admiral P. E. Versaw, dated January 30, 1991, summarized the Coast Guard's internal views on the issue of preemption and the effects of section 1018. This opinion was part of the record before the courts below. (JA-42 to JA-63.) The Chief Counsel's opinion outlines a broad approach to reviewing state laws vis-a-vis federal preemption principles, *Ray v. Atlantic Richfield*, and OPA. This post-OPA, but pre-BAP Coast Guard legal opinion is consistent with the positions of Intertanko and the United States. The opinion asserts that the States are preempted from imposing vessel design, construction, operations, manning, training, equipment and safety requirements, but may regulate liability, compensation, and response. This internal Coast Guard legal analysis, undertaken before Washington State's BAP Regulations became a litigated issue, aligns with Intertanko's positions and is contrary to occasional protests from State officials that the Coast Guard has wavered in its preemption analysis.

matters or Title I PWSA subject matters where the federal government has acted pursuant to discretionary authority from Congress. Finally, we submit that conflicts with federal purposes and objectives and impairment of "federal superintendence of the field" as identified by this Court in *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), and *Florida Line and Avocado Growers Inc. v. Paul*, 373 U.S. 139, 142 (1963), compel invalidation of the State BAP regulations under conflict preemption analysis.[27]

The concern that State actions might undermine federal interests is heightened where the state or locality seeks to regulate "primary conduct" of the vessel as opposed to peripheral issues that impose penalties or liabilities. *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 629 (1st Cir. 1994). Here the State of Washington purports to act directly

27. Throughout this litigation, the State has occasionally claimed that Intertanko has "agreed that it was not impossible to comply with the BAP rules, federal law and Coast Guard rules." *See, e.g.*, State Respondents' Brief in Opposition to Petitions for Certiorari at 17 and Intertanko response to interrogatory at JA-87. This claim overstates the decision by Intertanko to rest its theory of conflict preemption in the summary judgment context on the "obstacle to the full accomplishment and execution of federal purpose" test enunciated in *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) and the analysis of "whether both [federal and state] regulations can be enforced without impairing the federal superintendence of the field" criterion set out in *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 139, 142 (1963). It must by now be clear to the State that Intertanko views the field of vessel safety and marine environmental protection as one heavily laden with federal officials charged with significant responsibilities of superintendence of the merchant marine and international vessel traffic under Title 46, a superintendence that is significantly impaired by State departures from the details of that scheme, and thus vulnerable under conflict preemption analysis. Because we contend, however, that the BAP rules must fall under principles of express and field preemption, we here emphasize those issues. The focus of the United States has to this point been primarily on a conflict preemption analysis.

on the primary conduct of vessels — operations, procedures, navigation, crew qualifications and training — of vessels and their crews. Thus, the invasive impact of the State actions is direct and disfavored.

The earmarks of implied field preemption conditions have been described as follows:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citations omitted).

Implied preemption is also said to occur when the scheme of federal regulation is "sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary regulation" or the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Hillsborough County, Florida v. Automated Med. Labs*, 471 U.S. 707, 713 (1985) The above-described system of tank vessel regulation does not suggest room for "supplementary regulation" by the states. The federal interest is historically dominant.

The regulation of vessels, their crews, operations and activities is, under federal and international law, an activity closely controlled through inspections and certifications of the vessels, their crews and their management. Although the high seas leg of their voyages are less minutely controlled than are the flights of civil aircraft, tank vessels trading to or between the United States can be accurately said to sail

"only by federal permission, subject to federal inspection, in the hands of federally certified personnel under an intricate system of federal commands." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633-34 (1973) (quoting *Northwest Airlines Inc. v. Minnesota*, 322 U.S. 292, 303 (1944)). The PWSA, as amended by the PTSA, imposes on the Secretary of Transportation and his delegees a mandatory duty to prescribe standards and requirements governing tanker vessel "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels to which this chapter applies." 46 U.S.C. § 3703(a). An elaborate system of certificates and inspections, national and international, undergirds this system. This degree of detailed control over vessel operations, coupled with the non-discretionary structure of Congressional directives to the Secretary of Transportation compels a finding of field preemption in the subject matter areas listed in section 3703(a) of PWSA.

In circumstances in which the challenged state regulations reflect traditional applications of police powers, federal courts do not lightly presume to displace the exercise of such powers. *Medtronic v. Lohr*, 518 U.S. 470, 471 (1996) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This is not such a circumstance. Here it is the State that advocates a new, not traditional, role for state power in its assertion of authority to regulate vessel operations, personnel qualifications, and manning, subjects historically regulated by the national government.

D. That The State BAP Regulations May Have Environmental Or Conservation Elements Or Particular Local Connections Does Not Change The Preemptive Effect Of Federal Law

In *Ray* the Court noted that previous decisions have spoken approvingly of "reasonable, non- discriminatory conservation and environmental protection measures." *Ray*, 435 U.S. at 164. The *Ray* opinion also identified the

disputed State tug escort provisions as being "akin to an operating rule arising from the peculiarities of local waters that call for special precautionary measures. . . ." 435 U.S. at 171. Experience suggests that the State here will endeavor to use these phrases either alone or in combination to excuse its efforts to regulate vessel operations, personnel qualifications, and manning and argue that the contested State vessel regulations fall within this realm of apparent permission. Intertanko notes that the *Ray* Court's reference to "reasonable, non-discriminatory conservation and environmental protection measures" was drawn from *Douglas v. Seacoast Products, Inc.* 431 U.S. 265, 277 (1977), a case in which Virginia fishing restrictions forbidding non-resident menhaden catches were found preempted by the Federal Enrollment and Licensing Act. The allusion in *Douglas* to acceptable conservation and environmental measures was based on nineteenth century decisions permitting state limits on fishing implements and methods. *See Manchester v. Massachusetts,* 139 U.S. 240 (1891) and *Smith v. Maryland*, 18 How. 71 (1855). Moreover, the qualification on this dictum in *Douglas* was that such measures were assumed to be "otherwise within their [the States'] police power." *Douglas,* 431 U.S. at 277. Here, of course, Intertanko contends that the individual states have never previously exercised police powers over questions of on-board vessel operational procedures, personnel qualifications, training and manning. Efforts to classify these activities as exercises of police powers ignore the historic and exclusive federal presence in these areas.

Similarly, the Court's decision in *Huron Portland Cement Co., v. Detroit*, 362 U.S. 440 (1960) provides no shelter for the State's aspirations. In that case, the Court upheld a Detroit municipal smoke abatement ordinance as applied to stack emissions from vessels moored within the city limits. The shipowner contended that the federal Boiler Inspection Act preempted the city's assertion of enforcement claims against

actual exhaust emissions from the inspected boilers during dockside operations. The Court reasoned that the Detroit ordinance and the federal boiler inspection statute had two entirely different purposes — vessel and passenger safety for the federal statute and air quality and cleanliness concerns for the municipality. This pronounced distinction of purpose spared the Detroit ordinance. When reviewed by the *Ray* Court, the prior cases permitting state action were distinguished with the observation that ". . . in none of the relevant cases sustaining the application of state laws to federally licensed or inspected vessels did the federal licensing or inspection procedure implement a substantive rule of federal law addressed to the object also sought to be achieved by the challenged state regulation." *Ray*, 435 U.S. at 164. This contrasted with the disfavored circumstance of both *Ray* and the instant case where the Title II PWSA purposes of "insuring vessel safety and protecting the marine environment" aim "precisely at the same ends" as the Washington State regulations. *Ray*, 435 U.S. at 165.

It is also evident that the reference in *Ray* to an "operating rule arising from the peculiarities of local waters" established nothing more than to place the disputed State tug escort provision within Title I of PWSA for preemption analysis purposes. 435 U.S. at 171. Once spotted within Title I, the Court looked to see whether the federal authorities had acted in the subject matter. 435 U.S. at 171-72. While the absence of a federal tug escort requirement in *Ray* preserved the State tug escort rule at least until federal action was taken, there are no state rules here at issue that fall outside established, acted-upon federal subjects of regulation.

III. SECTION 1018 OF THE OIL POLLUTION ACT OF 1990 DOES NOT AUTHORIZE STATE REGULATORY ACTIONS ADDRESSING ON-BOARD STANDARDS AND REQUIREMENTS FOR TANK VESSELS OPERATIONS, PERSONNEL QUALIFICATIONS AND MANNING

The district court and the court of appeals were encouraged in their permissive views of State activities in federal vessel safety areas by expansive interpretations of section 1018 of the Oil Pollution Act of 1990. Both courts relied on this provision to dispel the multiple layers of constitutional concern presented by both Intertanko and the United States. A proper interpretation of section 1018, however, compels both a finding of preemption and a reversal of the decisions of the courts below. Because of the critical role this provision played in influencing so many elements of the decision of the Court of Appeals, we here restate the pertinent language of sections 1018 (a) and (c):

> Title I – Liability and Compensation
>
> Section 1018 – Relationship to Other Law
>
> (a) Preservation of State authorities; Solid Waste Disposal Act
>
> Nothing in this chapter[28] or the Act of March 3, 1851 shall —
>
> (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to —

28. As enacted, section 1018 read "Nothing in this Act. When section 1018 was codified, all references to "Act" became "chapter." "This chapter" is entitled "Chapter 40 – Oil Pollution" of Title 33. 33 U.S.C. §§ 2701-2761. The Title IV spill prevention provisions to which the State wishes to extend non-preemption provision, are generally found in Title 46. 46 U.S.C § 7101 *et seq.*

> (A) the discharge of oil or other pollution by oil within such State; or
>
> (B) any removal activities in connection with such a discharge; or
>
> (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 *et seq.*) or State law, including common law.
>
> * * *
>
> (c) Additional requirements and liabilities; penalties Nothing in this chapter, the Act of March 3, 1851 (46 U.S.C. § 183 *et seq.*), or section 9509 of title 26, shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof —
>
> (1) to impose additional liability or additional requirements; or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge, or substantial threat of discharge, of oil.

Section 1018(a) and (c) of OPA 90 (33 U.S.C. § 2718(a) and (c)).

The words and terms used in section 1018 have all been defined and are susceptible of unambiguous interpretation. Title I of OPA 90 defines "discharge", liability", and "removal".[29] In addition, the United States Coast Guard has

29. *See* 33 U.S.C. §§ 2701(7), (17), (30).

defined both the phrase "substantial threat of discharge"[30] and "this Act".[31]

Section 1018 preserves, but does not expand, a narrow, pre-existing authority of state and local governments to impose liabilities, penalties and requirements subsequent to a discharge of oil from a tank vessel into state waters. The defining context of 1018(c) is particularly clear in view of the fact that it concludes with the limiting language "relating to the discharge, or substantial threat of discharge, of oil."

Judge Graber's dissent to the Court of Appeals denial of rehearing in *International Association of Tanker Owners v. Locke*, thoroughly examines the history and purposes of section 1018:

> First, Congress placed these preemption clauses in a Title that addresses only *liability and compensation* for oil spills that actually occur. That placement (especially considering the full wording of the clauses) suggests that Congress intended for the clauses to apply only to the provisions in that Title. A second contextual clue strengthens that inference: A separate section in Title IV contains its own preemption clause. *See* § 4202(c) (Title IV), codified at 33 U.S.C. § 1321(o)(2). Moreover, sections in other Titles of OPA 90 include their own preemption provisions as well. *See* § 5002(n) (Title V), codified at 33 U.S.C. § 2732; § 8202 (Title VIII), codified at 43 U.S.C. § 1656(e).

30. "Substantial threat of such a discharge" is "any incident involving a vessel that may create a significant risk of discharge of cargo oil. Such incidents include, but are not limited to groundings, stranding, collisions, hull damage, fire, explosion, loss of propulsion, flooding, on-deck spills, or other similar occurrences." 33 C.F.R. § 155.1020.

31. "Act" means "Title I of the Oil Pollution Act of 1990 (Pub. L. 101-380; 33 U.S.C. 2701 through 2719)." 33 C.F.R. § 136.5(b).

Pet. App. C at 81a-82a (emphasis in original) (footnotes omitted).

Judge Graber was precisely on target when recapitulating the legislative history as follows:

> In summary, before Congress held its Conference Committee, the Senate had a bill with: (a) a preemption clause in its oil pollution liability and compensation title (Title I, § 106); and (b) some oil spill prevention provisions in Title III, which had their own specific preemption provision (§ 310). The House, where most of Title IV originated, had only one preemption provision (§ 1018), which was similar to the Senate's § 106 and which the House intended to apply only to oil spill liability and compensation.
>
> * * *
>
> The Conference Committee's deletion of the only preemption clause that applied specifically to oil spill prevention, and its reliance instead on two provisions that never applied to prevention provisions, together suggest that Congress did not intend its final version of § 1018 to apply to OPA 90's oil spill prevention provisions (Title IV).

Pet. App. C at 87a-88a (footnote omitted); *see also National Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atlantic Corp.*, 924 F. Supp. 1436, 1448 (E.D. Va. 1996).

A. Section 1018 Rationalized And Consolidated A Number Of Similar Non-preemption Clauses That Governed Liability And Compensation. None Of These Provisions Permitted On-Board Vessel Regulation

Predecessors to section 1018 include the Trans-Alaska Pipeline Authorization Act ("TAPAA") (43 U.S.C. § 1653(c)(9)), the Outer Continental Shelf Lands Act ("OSCLA") (43 U.S.C. § 1820(c)), the Deepwater Port Act

("DPA") (33 U.S.C. § 1517(k)(1)) and the Federal Water Pollution Control Act ("FWPCA") (33 U.S.C. § 1321(o)(2)). These provisions addressed liability and compensation for discharges. Section 1018 is no different.

The repeal by OPA of all but one of these close analogs to section 1018 supports Intertanko's position that section 1018 was a carry-forward and consolidation of non-preemption statutes that had applied to maritime oil spill liability regimes.

The only pre-existing non-preemption provision to survive OPA 90 was section 1321(o)(2) of the FWPCA. This section is almost identical to section 1018 of OPA:

> [n]othing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirements or liabilities with respect to the discharge of oil or hazardous substance into any waters within such State, *or with respect to any removal activities related to such discharge*.

33 U.S.C. § 1321(o)(2) (emphasis added). The emphasized section was added by OPA in (OPA section 4202).

These very similar savings clauses from other statutes, by context and by direct language, have always been limited to maritime liability and compensation in the aftermath of a discharge. The liability and compensation provisions of the TAPAA, DPA, OCSLA and FWPCA preserved the ability of states to impose their own liability requirements. There is no reason to find that section 1018 had any greater impact.

B. The Conference Report Accompanying Opa Expressly Protects And Preserves This Court's Holding In *Ray v. ARCO* And Contradicts The Lower Courts' Broad Reading Of Section 1018

The Conference Report to the final version of OPA 90 expressly contradicts the expansive non-preemptive reading of section 1018 embraced by the lower courts. Nowhere in

the Title I section of the Conference Report is the term "prevention" used. Nowhere is there any mention of a state being permitted to impose on-board safety requirements for vessels. Nowhere is the PWSA mentioned in the context of non-preemption nor is there any hint that Title I's topics go beyond liability, compensation, discharges, removal, penalties and funding. The Conference report discussed both the Senate and House versions of the bill/Act:

> Both provisions preserve the authority of any State to establish or *maintain funds* for cleanup or compensation purposes and to *collect any fees or penalties imposed* under State law. Both provisions also authorize States to enforce the *financial responsibility requirements of this Act on their own navigable waters*. . . .
>
> Similarly, subsection (c) clarifies that nothing in the substitute, the Limitation of Liability Act, or in section 9509 of the Internal Revenue Code shall affect in any way the authority of the United States or any State or local government to impose *additional liability or requirements, or to determine the amount of, any civil penalty for any violation of law*. . . .
>
> The Conference substitute does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company*, 435 U.S. 151 (1978) (emphasis added).

H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. at 121-22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 799-800.

The Conference Report conforms the statute with the prior case law of this Court. Congress preserved state authority to impose liabilities, fines, or penalties for discharges occurring in state waters. States are not barred from imposing "additional liability or requirements" with respect to the "discharge of oil," "other pollution by oil," or "removal activities" connected to discharges, requirements

states were permitted to impose prior to OPA 90. Section 1018, however, does not cede to a state the authority to impose additional safety requirements on federally or internationally certified vessels operating normally in the course of their business in interstate and foreign commerce.

The significance of the Conference Report's approving and protective view of the Court's holding in *Ray v. ARCO* cannot be understated. Congress did not intend to alter existing law or relationships between the federal and state governments on matters of marine safety such as those in dispute in *Ray* or here. A rational reading of the Conference Report Language on the continuing vitality of *Ray* and the plain language of section 1018 yields a restatement of the proposition that states are, and remain, free to regulate with respect to liability and compensation for oil pollution and removal activities relating to a discharge of oil in state waters, but regulations which purport to regulate on-board marine safety requirements, such as those found in Title II of the PWSA (the focus of the *Ray* decision) remain preempted by Federal law.

CONCLUSION

Petitioner Intertanko respectfully petitions this Court to find that federal statutes, regulations and international agreements to which the United States has acceded operate to oust state and local governments from imposing differing standards and requirements governing vessel operations, personnel qualifications and training on vessels subject to federal requirements. The decision of the Court of Appeals, to the extent it upheld Washington State regulations affecting operations and personnel of tank vessels in the interstate and foreign commerce of the United States, should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL.

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), PETITIONER

v.

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether regulations adopted by the State of Washington governing staffing and operation of ocean-going oil tankers engaged in coastal and international commerce are pre-empted to the extent that they conflict with international obligations of the United States and Coast Guard regulations for such tankers promulgated pursuant to federal statutes and international conventions and agreements, and interfere with the accomplishment of federal objectives concerning tanker safety.

PARTIES TO THE PROCEEDING

The petitioner in this proceeding is the United States of America, which intervened in the case below. The case was originally brought by the International Association of Independent Tanker Owners (Intertanko) against various Washington State officials responsible for the promulgation and enforcement of the Washington regulations at issue here. Those officials are: Gary Locke, Governor of the State of Washington; Christine O. Gregoire, Attorney General of the State of Washington; Barbara J. Herman, Administrator of the State of Washington, Office of Marine Safety, was succeeded by Tom Fitzsimmons, Director, Washington State Department of Ecology, when the Office of Marine Safety was merged into the Department of Ecology; David MacEachern, Prosecutor of Whatcom County; K. Carl Long, Prosecutor of Skagit County; James H. Krider, Prosecutor of Snohomish County; and Norman Maleng, Prosecutor of King County. The Natural Resources Defense Council, Washington Environmental Council, and Ocean Advocates intervened in the district court.

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In the Supreme Court of the United States

No. 98-1701

UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL.

No. 98-1706

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), PETITIONER

v.

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 148 F.3d 1053. The court's order denying rehearing (Pet. App. 36a-54a) is reported at 159 F.3d 1220. The opinion of the district court (Pet. App. 55a-89a) is reported at 947 F. Supp. 1484.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1998. A petition for rehearing was denied on November 24, 1998. On February 12, 1999, Justice O'Connor extended the time in which to file a petition for a writ of certiorari to and including March 24, 1999, and, on March 15, 1999, further extended the time in which to file to and including April 23, 1999. The petition was filed on April 23, 1999, and granted on September 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the United States Constitution, Ports and Waterways Safety Act of 1972, Port and Tanker Safety Act of 1978, Oil Pollution Act of 1990, Coast Guard regulations, and Washington state regulations are set forth in the Petition Appendix, at 90a-117a. A compendium of pertinent statutes, treaties, and regulations has been lodged with the Clerk of this Court and served on the parties.

STATEMENT

This case concerns the validity of a regulatory scheme adopted by the State of Washington that seeks to govern the design, equipping, staffing, personnel qualifications, and operation of oil tankers engaged in interstate and international commerce. The Washington regulations, which apply to all ships (including foreign-flag vessels) that transport oil through United States territorial waters within the State of Washington, differ in numerous respects from the comprehensive national and international standards developed for the same purpose. Those standards exist in international conventions formally ratified by the United States, other agreements with foreign nations, various Acts of Congress, and implementing regulations promulgated by the Secretary of Transportation through the Coast Guard. The federal framework of tanker regulation was previously considered by this Court in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), although the particulars of that framework have been modified and strengthened in a number of respects during the intervening 21 years.

1. a. The United States, through the Coast Guard and other federal agencies (such as the Departments of State and Defense, the Environmental Protection Agency, and the National Oceanic and Atmospheric Administration), is a leader in the development of international standards establishing

uniform requirements for oil tankers, as well as other vessels. Those standards serve to promote vessel safety, protect the marine environment, and facilitate international maritime commerce. See S. Treaty Doc. No. 39, 103d Cong., 2d Sess., at III (1994) ("The United States has basic and enduring national interests in the oceans and has consistently taken the view that the full range of these interests is best protected through a widely accepted international framework governing uses of the sea."). The international regime, embodied in numerous agreements ratified by the United States, depends upon the principle of reciprocity: all parties are assured of a ship's compliance with international standards through the certification of the ship by the government of its own flag nation, and that certification is then respected by the other parties, including the United States, to permit vessels with certificates to enter the ports of parties and thus to allow for the uninterrupted flow of international maritime traffic.[1]

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[1] See International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention), July 7, 1978, Int'l Maritime Org., Doc. Sales No. IMO-945E (1996) (entered into force Apr. 28, 1984), as amended by the Seafarers' Training, Certification and Watchkeeping (STCW) Code, July 7, 1995, Int'l Maritime Org., Doc. Sales No. IMO-945E (1996), which is implemented domestically by the Coast Guard pursuant to 46 U.S.C. 2101 *et seq.*; International Convention for the Safety of Life at Sea (SOLAS Convention), Nov. 1, 1974, 32 U.S.T. 47 (entered into force May 25, 1980), as amended, and the Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, Feb. 17, 1978, 32 U.S.T. 5577, as amended through July 1, 1997, Int'l Maritime Org., Doc. Sales No. IMO-110E (1997), which is implemented by the Coast Guard pursuant to Executive Order No. 12,234, 3 C.F.R. 277 (1981); International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code), Nov. 4, 1993, Res. A.741(18), Int'l Maritime Org., Doc. Sales No. IMO-186E (1994); see also Resolutions of the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, May 24, 1994, Int'l Maritime Org., Doc. Sales No. IMO-110E (1997) (entered into force July 1, 1998) (making ISM Code

Over the years, Congress has enacted a series of statutes that provide for the establishment of federal standards in a wide range of subjects affecting shipping in waters subject to United States jurisdiction. Although these statutes adopt standards to govern maritime commerce among the States, they also furnish a means to implement the United States' treaty obligations, codify in domestic law the international system of tanker regulation, and confirm the United States' leadership in developing international rules for tanker safety. See, *e.g.*, H.R. Rep. No. 1384, 95th Cong., 2d Sess. Pt. 1, at 6-9 (1978). Many of the statutory provisions in turn direct the Secretary of Transportation (who has delegated that authority to the Coast Guard, 49 C.F.R. 1.46(b) and (c)), to establish the applicable standards.

The pertinent statutory provisions are codified in two different Titles of the United States Code. Title 46 of the Code establishes a comprehensive regulatory framework for ships

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mandatory), and Guidelines on Implementation of the International Safety Management Code by Administrators, Nov. 23, 1995, Res. A.788(19), Int'l Maritime Org., Doc. Sales No. IMO-117E (1995) (to assist in uniform implementation by administrators), acceded to by the United States in 1995, and implemented by the Coast Guard pursuant to 46 U.S.C. 3201-3205 (Supp. II 1996); International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, Int'l Maritime Org., Doc. Sales No. IMO-520E (1997), as amended by the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978 (MARPOL 73/78), Int'l Maritime Org., Doc. Sales No. IMO-520E (1997), implemented by the Coast Guard pursuant to 33 U.S.C. 1901-1915 (1994 & Supp. III 1997); Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (CVTMS Agreement), Dec. 19, 1979, U.S.-Can., 32 U.S.T. 377 (entered into force Dec. 19, 1979); United Nations Convention on the Law of the Sea (UNCLOS), Dec. 10, 1982, U.N. Div. for Ocean Affairs & Law of the Sea Office of Legal Affairs, U.N. Sales No. E.97.v.10 (1997), which has not yet been ratified by the United States, but which, pursuant to the President's Ocean Policy Statement, 19 Weekly Comp. Pres. Doc. 383 (Mar. 10, 1983), is recognized by the United States to reflect customary international law to which the United States adheres.

in the navigable waters of the United States, addressing such subjects as "Inspection and Regulation of Vessels" (Pt. B, 46 U.S.C. 3101 *et seq.*), "Marine Casualties" (Pt. D, 46 U.S.C. 6101 *et seq.*), "Merchant Seamen Licenses, Certificates, and Documents" (Pt. E, 46 U.S.C. 7101 *et seq.*), and "Manning of Vessels" (Pt. F, 46 U.S.C. 8101 *et seq.*).[2] Chapter 37 of Title 46 contains a recodification of Title II of the Ports and Waterways Safety Act of 1972 (PWSA), Pub. L. No. 92-340, 86 Stat. 427,[3] as amended by the Port and Tanker Safety Act of 1978 (PTSA), Pub. L. No. 95-474, § 5, 92 Stat. 1480, and subsequent Acts of Congress. Section 3703(a) of Title 46 provides that "[t]he Secretary shall prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning" of tank vessels "that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." See generally 46 U.S.C. 3703(a)(1)-(7). In developing those standards, the Secretary must consult with and consider the views of, *inter alia*, interested federal agencies, "officials of State and local governments," and "representatives of environmental groups." 46 U.S.C. 3703(c). A tank vessel of the United States must have a certificate of inspection issued by the Secretary endorsed to indicate that the vessel complies with the regulations issued under Chapter 37. See 46 U.S.C. 3710(a). Consistent with the role those regulations play in implementing the international regime, however, Congress has provided that, with respect to foreign-flag tank vessels, the Secretary may accept a certificate

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[2] The prior Title 46 was reorganized and enacted into positive law in 1983 by Public Law No. 98-89, § 1, 97 Stat. 500.

[3] Title II of the Ports and Waterways Safety Act of 1972 was in turn a revision of the Tank Vessel Act of 1936, ch. 729, 49 Stat. 1889, which was the first comprehensive federal law specifically regulating tank vessels. See pp. 25-26, *infra*.

issued by the government of a foreign country under a treaty, convention, or other international agreement to which the United States is a party, as a basis for issuing a certificate of compliance with federal standards. 46 U.S.C. 3711(a).

The other set of statutory provisions primarily relevant to this case is in Title 33 of the United States Code (entitled "Navigation and Navigable Waters"), in its Chapter 25, 33 U.S.C. 1221 *et seq.* (entitled "Ports and Waterways Safety Program"). That Chapter contains Title I of the PWSA, 86 Stat. 424, as amended by the PTSA, § 2, 92 Stat. 1471, and subsequent Acts of Congress. Section 1223 of Title 33 provides that the Secretary (1) "may construct, operate, maintain, improve, or expand vessel traffic services"; (2) "shall require" appropriate vessels to comply with any such service; (3) "may require vessels to install and utilize" navigation and other equipment that is "necessary to comply with a vessel traffic service"; (4) "may control vessel traffic in areas subject to the jurisdiction of the United States which the Secretary determines to be hazardous," by specifying times of entry or departure, establishing vessel traffic routing schemes, establishing vessel size, speed, draft limitations and operating conditions, and restricting operations to vessels having certain operating capabilities; and (5) "may require the receipt of prearrival messages from any vessel" in sufficient time to permit advance traffic planning prior to port entry. 33 U.S.C. 1223(a)(1)-(5) (1994 & Supp. 1997).

Unlike 46 U.S.C. 3703(a), under which the Secretary "must issue" all regulations on the specified subjects under Title II of the PWSA that he deems necessary to ensure tank vessel safety and protect the marine environment, *Ray*, 435 U.S. at 165, Section 1223 of Title 33 "merely authorizes and does not require" the Secretary to issue regulations under Title I of the PWSA to govern traffic at local ports and related matters, *id.* at 171. In deciding whether to issue

regulations and what form they should take, the Secretary must "take into account all relevant factors concerning navigation and vessel safety and protection of the marine environment." 33 U.S.C. 1224(a). The procedures the Secretary must follow in issuing regulations are similar to those under 46 U.S.C. 3703 discussed above. See 33 U.S.C. 1231(b). The Secretary is authorized to bar from operation on the navigable waters or in any port of the United States any vessel that fails to comply with regulations under those provisions, under Chapter 37 of Title 46, "or under any other applicable law or treaty." 33 U.S.C. 1228(a)(2).

b. Because the United States is a "flag state" (meaning that it is responsible for developing standards and regulations for ships flying the U.S. flag), a "port state" (meaning that U.S. ports receive cargo, and oil in particular, arriving on foreign-flag vessels), and a "coastal state" (meaning that foreign flag vessels navigate through U.S. coastal waters without entering its ports), the United States has a substantial interest in ensuring that all vessels that transit its waters, particularly foreign-flag vessels, comply with comprehensive safety and environmental protection standards.

For example, the International Convention for the Safety of Life at Sea (SOLAS), to which the United States became a party on November 1, 1974, 32 U.S.T. 47, sets standards to promote safe operations of vessels at sea. The SOLAS Convention establishes that every ship, when in a port of another signatory nation, is "subject to control by officers duly authorized by [the port nation] Government in so far as this control is directed towards verifying that the certificates issued under [the Convention] are valid." Annex, Ch. I, Pt. B, Reg. 19(a), Int'l Maritime Org., Doc. Sales No. IMO-110E (1997). But the SOLAS Convention, like other conventions at issue in this case (see note 5, *infra*), requires port nations to accept valid certificates (issued by the flag nation government) unless there are clear grounds for believing that the

condition of the ship or its equipment does not correspond substantially with the conditions for which the certificate was issued. *Id.* Reg. 19(b). If control is improperly exercised and a ship is unduly detained or delayed, the port nation government is responsible for compensation for any loss or damage suffered by the ship. *Id.* Reg. 19(f). Chapter I of the SOLAS Convention provides that foreign ships are subject to control only by officers duly authorized by the national government that is the signatory to the Convention. Pursuant to Executive Order No. 12,234 (see 3 C.F.R. 277 (1981)), which implements the SOLAS Convention, and the Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, § 602, 110 Stat. 3927, Coast Guard personnel are the duly authorized officers who may subject foreign vessels to control in United States ports under that Convention. See also 33 U.S.C. 1903(a), 1904 (1994 & Supp. III 1997) (same for MARPOL); 46 U.S.C. 3205 (Supp. III 1997) (ISM Code), 8304 (same for STCW through Officers' Competency Certificates Convention). Officials of Washington and other States are not. By June 1999, 139 nations, representing more than 98% of the world's shipping, had become parties to SOLAS. See IMO Treaty Ratification Tabulation table at <http://www.imo.org/imo/convent/summary.htm>.

The United States also has ratified the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) and all four of the MARPOL Annexes currently in force, and has implemented their provisions through, *inter alia*, the statutory provisions discussed above (see pp. 5-7, *supra*) and regulations issued under them.[4] More than 90 countries, representing more than three-quarters of world shipping, are parties to the four MARPOL

[4] The Senate gave its advice and consent to the ratification of MARPOL on July 2, 1980, 126 Cong. Rec. 18,486-18,492, and it was implemented on October 21, 1980, by Pub. L. No. 96-478, 94 Stat. 2297.

annexes that are in force. See IMO Treaty Ratification Tabulation table, *supra*. The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention), which promotes the safety of life at sea and the protection of the marine environment by establishing common rules for the training, certification, and watchkeeping for seafarers, is in force for 133 nations representing more than 98% of world shipping. *Ibid.* The United States became a party to the STCW Convention in 1991 (137 Cong. Rec. S5731 (daily ed. May 14, 1991); U.S. Dep't of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1999*, at 417 (1999)), and has accepted the 1995 amendments to that Convention (*Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions as at 31 December 1998*, Int'l Maritime Org., Doc. Sales No. J/7031, at 287-288; 62 Fed. Reg. 34,506 (1997)).[5] International agreements and the federal statutory and regulatory framework with which they are integrated thus provide for a broad range of standards governing vessels, including design, equipment, construction, manning, personnel qualification, safety management, and operations.

c. In *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), this Court addressed whether Washington State regulations applicable to tankers were preempted by various provisions

[5] The requirements of certification and reciprocity also apply in the context of rules established pursuant to other international agreements. See STCW Convention, Arts. VI (certificates), X (control); MARPOL 73/78, Arts. 5-7; *id.* Annex I, Ch. 1, Regs. 5 (issue of certificates), 7 (form of certificate), 8A (port state control on operational requirements); SOLAS Convention, Annex, Ch. I, Pt. B; *id.* Ch. IX, Regs. 4 (certification), 6 (verification and control); *id.* Ch. XI, Reg. 4 (port state control on operational requirements).

of federal law, specifically including Title II of the PWSA and regulations issued under Title I of that Act, both of which are applicable in this case as well. In holding that the State's attempts to regulate the design and construction of oil tankers were preempted, the Court concluded that, in Title II of the PWSA, 46 U.S.C. 391a (Supp. V 1975) (now codified as amended at 46 U.S.C. 3701 *et seq.*), Congress "has entrusted to the Secretary [of Transportation] the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States," and thereby "intended uniform standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements." 435 U.S. at 163. The Court further noted that "Congress expressed a preference for international action and expressly anticipated that foreign vessels would or could be considered sufficiently safe for certification by the Secretary if they satisfied the requirements arrived at by treaty or convention." *Id.* at 168.

With respect to operations in local waters, however, the Court concluded that Washington's regulations were not automatically preempted by Title I of the PWSA, 33 U.S.C. 1221-1227 (Supp. V 1975), in the absence of regulations issued under that Title addressing the same subject matter. 435 U.S. at 171. The Court emphasized, however, that if the Coast Guard adopts regulatory requirements governing a particular subject (or concludes that no such requirements should be adopted at all), the state rules would be preempted. *Id.* at 171-172; see *id.* at 173-178 (invalidating Washington statute excluding from Puget Sound all tankers in excess of 125,000 deadweight tons because it differed from a Coast Guard rule). The Court explained that, under Title I of the PWSA, Congress desired that a federal official with an overview of all possible ramifications would promulgate

regulations after "balancing all of the competing interests." *Id.* at 177.

d. After the *Exxon Valdez* oil spill in Alaska in 1989, Congress enacted the Oil Pollution Act of 1990 (OPA), Pub. L. No. 101-380, 104 Stat. 484. Title I of OPA sets federal standards for liability and compensation for the discharge of oil into navigable waters of the United States. 104 Stat. 486-508. Subtitle A of Title IV of OPA—which concerns oil-spill prevention—addresses certain discrete issues relating to tanker personnel qualifications, manning, operations, design, and construction, and it does so in part by strengthening (or directing the exercise of) certain powers the Secretary already had under prior law. See 104 Stat. 509-523. With one exception, Subtitle A of OPA is consistent with international standards. See n.19, *infra*.

e. In 1994, pursuant to Washington Revised Code Chapter 88.46, Washington adopted a set of new regulatory requirements, which it called "Best Achievable Protection" (BAP) Regulations. See Wash. Admin. Code §§ 317-21-020 *et seq.* (1996). Those rules were designed to impose more stringent safety requirements on tankers, and thereby prevent oil spills. In pertinent part, the state rules require installation of specified navigational and emergency towing equipment; impose reporting requirements for certain vessel casualties regardless of whether they occur in Washington waters; mandate particular language-proficiency requirements and personnel qualifications for vessel officers and crews; establish maximum crew work hours; set drug-testing policies; and impose position- monitoring requirements. See Pet. App. 57a-60a (describing the provisions). Washington's regulations differ from the international and federal regulatory regime in numerous ways. See pp. 33-41, *infra*. Failure to comply with the Washington BAP rules subjects a violator to statutory penalties and a prohibition on

entry to port. Wash. Rev. Code §§ 88.46.070, 88.46.080, 88.46.090 (1996).

2. The International Association of Independent Tanker Owners (Intertanko) brought this suit for declaratory and injunctive relief against Washington state and local officials responsible for enforcing the BAP regulations. The district court granted Washington's motion for summary judgment and denied Intertanko's motion. Pet. App. 55a-89a. The district court recognized that "[a]lthough protection of the marine environment has historically been within the reach of the police powers of the state, shipping has traditionally been governed by federal law." *Id.* at 61a. The court also had "no doubt that the areas addressed by the Washington oil spill prevention rules, which generally cover tanker operations, personnel, management, technology, and information reporting, are also comprehensively regulated by federal statutes, regulations and treaty obligations." *Id.* at 69a. The court nevertheless sustained all of the Washington regulations.

The court relied principally on Section 1018(a) and (c) of OPA, which provides that "[n]othing in this Act" shall affect or preempt the authority of a State to impose "any additional liability or requirements with respect to * * * the discharge of oil or other pollution by oil within such State" or "additional liability or additional requirements * * * relating to the discharge, or substantial threat of a discharge, of oil." 33 U.S.C. 2718(a) and (c). The court concluded that, since Title IV of OPA contains some provisions addressing tanker operations, personnel management, technology, and information reporting, the effect of Section 1018 is that there is no preemption of any state laws that are inconsistent with

the federal regulatory regime, even though that regime rests on Acts of Congress other than OPA. Pet. App. 69a.[6]

3. The United States intervened after Intertanko appealed the district court's decision to the Ninth Circuit. The Ninth Circuit affirmed in part and reversed in part. Pet. App. 1a-35a. The court held that several Washington regulations requiring tank vessels to have certain navigation and towing equipment are preempted, *id.* at 26a-29a, but that state regulations imposing requirements with respect to staffing, personnel training, qualifications, and operation of tank vessels are not preempted, even where they depart from standards in international agreements and Coast Guard regulations, *id.* at 7a-25a.

Like the district court, the court of appeals relied primarily on Section 1018 of OPA. The court of appeals recognized that OPA is not the only federal statute that regulates tanker vessels, noting that the PWSA, the PTSA, and the Tank Vessel Act of 1936 do so as well. Pet. App. 11a. And the court of appeals rejected Washington's contention that Section 1018 of OPA, which provides that "this Act" shall not have preemptive effect, also applies to those other federal statutes. The court found that interpretation inconsistent with the "plain language" of Section 1018. *Ibid.* The court nevertheless held that the Washington regulations governing staffing, personnel training and qualifications, and operation of tank vessels are not preempted by Coast Guard regulations issued under those other federal statutes. *Id.* at 13a-19a. The court reasoned that OPA, "[a]s the most recent federal statute in the field, * * * reflects the full purposes and objectives of Congress better than [the other statutes

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[6] The district court also rejected Intertanko's contention that the Washington regulatory program violates the Commerce Clause and the foreign affairs powers of the United States Government. Pet. App. 81a-86a. The court of appeals likewise rejected those contentions. *Id.* at 32a-35a.

governing tankers], all of which [OPA] was designed to complement." *Id.* at 16a (internal quotation marks, citation, and emphasis omitted).

The court of appeals also rejected petitioners' contention that the challenged state rules are invalid because they conflict with various international agreements governing tankers. The court found that Congress had not embraced strict international uniformity because the relevant treaties set only minimum standards, and each signatory nation can impose higher standards. Pet. App. 17a-18a. Finally, the court of appeals concluded that Coast Guard tanker regulations do not preempt Washington's BAP rules even where the Coast Guard has expressed an intent to preempt such rules. *Id.* at 29a-32a. The court held that "Congress did not explicitly or impliedly delegate to the Coast Guard the authority to preempt state law." *Id.* at 31a. The court again relied on Section 1018 of OPA, reasoning that in view of Congress's unwillingness to preempt state oil-spill prevention efforts on its own in OPA, it was "implausible" to conclude that Congress intended to delegate power to the Coast Guard to do so. *Id.* at 31a-32a.

4. The court denied petitions for rehearing filed by the United States and by Intertanko. Pet. App. 36a-37a. Judge Graber dissented. *Id.* at 37a-54a. In her view, the court's reliance on Section 1018 of the OPA was misplaced, because that Section is limited to liability and compensation for oil spills, and does not apply to preventive measures. *Id.* at 51a.

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[7] The Ninth Circuit did not reach two other bases raised by the United States for challenging the Washington regulations: their interference with innocent passage rights, and their conflict with a bilateral agreement between the United States and Canada concerning traffic in the Strait of Juan de Fuca. The court of appeals stated that those arguments had been raised for the first time on appeal, and the court declined to exercise its discretion to address them. Pet. App. 19a-20a; see notes 22 and 23, *infra*.

Judge Graber also concluded that the court had erred in holding that Congress must specifically have intended to give the Coast Guard power to preempt state regulatory schemes. *Id.* at 52a-54a.

SUMMARY OF ARGUMENT

Since ratification of the Constitution, the National Government has had paramount authority to regulate navigation of vessels in interstate and international commerce. The First Congress began the process of creating vessel rules, which has resulted in an ongoing, comprehensive network of federal standards governing the design and construction, alteration, repair, equipping, operation, personnel qualification, and manning of vessels, as well as the traffic rules they must follow when in United States waters. In *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), this Court held that the Ports and Waterways Safety Act of 1972 (PWSA) may preempt state rules in two ways: state regulations that fall within the subjects of Title II of the PWSA are ousted by field preemption principles; and state regulations governing subjects addressed by Coast Guard standards promulgated under Title I of the PWSA (or subjects for which the Coast Guard has decided that there should be no standard at all) are preempted under conflict preemption principles. Since *Ray*, Congress has enacted the Port and Tanker Safety Act of 1978, which carries forward the preemptive scope of federal statutory law in a range of subjects pertaining to vessels, and the United States has become a party to numerous international codes and conventions that provide for detailed regulation of vessels. In this case, examples of Washington BAP rules that are preempted under either field or conflict preemption principles include state rules imposing standards for drug and alcohol testing, crew training, management policies and practices, operational procedures for restricted visibility, advance notice of entry, event reporting of marine

casualties, emergency procedures, and pre-arrival operating procedures.

Under a proper analysis, a court would examine the State's regime on a regulation-by-regulation basis to determine whether the rule (1) encroached on a field occupied by federal law, or (2) conflicted with an existing federal standard duly adopted pursuant to an Act of Congress, international agreement, or federal regulation. The Ninth Circuit did not conduct such an analysis, instead upholding all of the state rules still at issue in this litigation on the erroneous theory that Section 1018 of the Oil Pollution Act of 1990 was intended to divest the Coast Guard of its authority, confirmed in *Ray*, to promulgate preemptive regulations under *other* federal statutes. The court's reasoning, however, is inconsistent with the plain language of Section 1018 and the preemptive reach of federal law recognized in *Ray*. The Ninth Circuit's decision also undermines important principles of reciprocity in the many international agreements concerning vessels to which the United States is a party.

ARGUMENT

CERTAIN OF THE WASHINGTON STATE RULES REGULATING TANKERS ENGAGED IN INTERNATIONAL AND INTERSTATE TRADE ARE PREEMPTED BY INTERNATIONAL AGREEMENTS, FEDERAL STATUTES, AND FEDERAL REGULATIONS

Under this Court's settled preemption jurisprudence, state law is preempted "in three circumstances":

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. * * * Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. * * * Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

English v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990) (citation omitted); see also *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978).

This case raises the issue whether a complex regime of federal rules—embodied in international treaties and agreements, federal statutes, and federal regulations— preempts rules promulgated by the State of Washington concerning the international and interstate tanker industry. In *Ray*, the Court held that aspects of that regime preempt certain fields of tanker regulations, and it addressed the design and construction rules for such vessels involved in that case. 435 U.S. at 161-168. Other aspects of the federal regime, the Court held, preempt state law only if the Coast Guard has issued a regulation addressing the same subject or decided that no standard should be established at all. *Id.* at 171-172. In this case, the Ninth Circuit held that all but one of the challenged Washington rules are categorically *not* preempted—even where the subject matter is one that is subject to the same sort of uniform national regulation under Title II of the PWSA as were tanker design and construction in *Ray*, or where there is a Coast Guard regulation under Title I of the PWSA addressing the same subject. That ruling cannot be reconciled with the long history of paramount federal regulation of maritime commerce; with the comprehensive framework of federal treaties, statutes, and regulations that now govern that commerce; and with this Court's decision in *Ray*.

A. The National Government Historically Has Exercised The Preeminent And Preemptive Role In Regulating International And Interstate Shipping

1 The Framers of the Constitution recognized the need for the National Government to exercise paramount authority in regulating international and interstate navigation. Writing in Federalist No. 64, John Jay observed that "[t]here are few who will not admit that the affairs of trade and navigation should be regulated by a system cautiously formed and steadily pursued; and that both our treaties and our laws should correspond with and be made to promote it." *The Federalist Papers* 392 (Clinton Rossiter ed., 1961). That statement reflected the disastrous experience under the Articles of Confederation, in which States could cause demonstrable harm to the country by individually abrogating treaties. Thus, as James Madison argued to the Constitutional Convention in favor of a strong national authority to conduct foreign relations:

> The tendency of the States to these violations [of treaties] has been manifested in sundry instances. The files of Cong[ress] contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shewn to us. This can not be the permanent disposition of foreign nations. A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole. The existing Confederacy does not sufficiently provide against this evil.

J. Madison, *Notes of Debates in the Federal Convention of 1787*, at 142 (Ohio Univ. Press ed. 1966). In Federalist No. 44, Madison similarly noted the danger of States being permitted to act independently on matters that interfere with the foreign relations of the Nation, "and hence the Union be

discredited and embroiled by the indiscretion of a single member." *The Federalist Papers*, *supra*, at 282. Accordingly, "[t]he restraint on the power of the States over imports and exports is enforced by all the arguments which prove the necessity of submitting the regulation of trade to the federal councils." *Id.* at 283. Those concerns were no less present if States had the power to exercise "arbitrary and vexatious powers" over interstate navigation, a result Alexander Hamilton described as "intolerable in a free country." Federalist No. 12, *id.* at 94.

2. Beginning with the First Congress in 1789, Congress has enacted legislation to set federal vessel standards. The first such law established a scheme of federal registration, with the holder of a vessel certificate being "entitled to the benefits granted by any law of the United States, to ships or vessels of the descriptions aforesaid." Act of Sept. 1, 1789, ch. 11, § 1, 1 Stat. 55. Soon thereafter, Congress imposed more stringent conditions on the requirements a vessel must meet to obtain a federal license. See Act of Dec. 31, 1792, ch. 1, 1 Stat. 287; Act of Feb. 18, 1793, ch. 8, 1 Stat. 305. The advent of steamships brought an extension of the federal licensing requirement for such vessels, Act of Mar. 12, 1812, ch. 40, 2 Stat. 694; Act of Mar. 3, 1825, ch. 99, 4 Stat. 129, as well as increasing concerns for the safety of passengers and crew members, which Congress perceived required further federal regulation, see Act of July 7, 1838, ch. 191, 5 Stat. 304. The 1838 Act authorized federal inspectors to assess the seaworthiness of the hull and the workability of the boiler and other machinery on steam vessels, and to confer a license only on those vessels that met the requisite standards. §§ 4, 5, 5 Stat. 305; see also Act of June 28, 1838, ch. 147, 5 Stat. 252.

In 1843, Congress imposed further equipment standards on federally-licensed steamboats by requiring that inspectors be assured that the vessel contained appropriate steer-

ing mechanisms. Act of Mar. 3, 1843, ch. 94, 5 Stat. 626. Six years later, Congress imposed operational rules for vessels navigating the "northern and western lakes." Act of Mar. 3, 1849, ch. 105, § 5, 9 Stat. 382. In 1852, Congress mandated additional requirements for safety equipment and special licenses for carrying dangerous articles. Act of Aug. 30, 1852, ch. 106, 10 Stat. 61. Congress also required that the master and engineer be specially licensed by a federal inspector, who would attest that the person "possess[ed] the requisite skill, and is trustworthy and faithful" to assure safe operation of the vessel. § 9, 10 Stat. 67.

In 1871, Congress enacted a significant overhaul of the regulatory regime governing steam-powered vessels, adding provisions for watchmen, other safety equipment, vessel design standards, inspection and testing of equipment, and licensing of captains, chief mates, engineers, and pilots. Act of Feb. 28, 1871, ch. 100, 16 Stat. 440. That Act further provided that the Department of the Treasury, which had supervisory authority over federal vessel inspectors, "shall * * * establish such rules and regulations as may be necessary" to provide adequate and current information about which persons, vessels, ship-builders, and equipment had satisfied the requisites of the statute, and such "rules and regulations to be observed by all steam-vessels in passing each other as they shall from time to time deem necessary for saf[e]ty." §§ 28, 29, 16 Stat. 449-450. Thus, by the time Congress enacted the Revised Statutes in 1873-1874, thereby placing in one central place the various laws pertaining to vessels, federal law contained extensive requirements for vessel and crew licensing, inspection, and certification of design, construction, and equipment. See Rev. Stat., Tit. 52 (1875). Those statutory requirements also included a broader mandate to the Treasury Department to "establish all necessary regulations required to carry out in the most effective manner the provisions of this Title, and such regulations, when approved by the Secretary of the Treasury, shall have the force of law." Rev. Stat. § 4405 (1875).[8]

3. From an early date, this Court recognized the primacy of those federal laws over competing state standards. See, *e.g.*, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In *Gibbons*, the Court held that a New York law purporting to confer an exclusive right to operate steamboats in New York waters was invalid to the extent that it precluded the holder of a federal license obtained under the 1793 statute from engaging in the commerce he was entitled to pursue under the federal statute. *Id.* at 212. The Court emphasized that, because those vessels were licensed under a federal statute, they had full authority to carry on their trade as conferred by Congress. *Id.* at 213 ("The grant of the privilege is an idle, empty form, conveying nothing, unless it convey[s] the right to which the privilege is attached, and in the exercise of which its whole value consists.").

In the decades after *Gibbons*, this Court found other state vessel requirements to be preempted by federal statutes governing vessel licensing, equipment standards, and operations. Thus, in *Sinnot* v. *Davenport*, 63 U.S. (22 How.) 227 (1859), the Court invalidated a state statute requiring the names of passengers to be recorded, holding that the federal license granted to the steamer contained "the only guards and restraints, which Congress has seen fit to annex to the privileges of ships and vessels engaged in the coasting trade[.] * * * In every such case, the act of Congress or

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[8] As maritime commerce continued to increase, Congress imposed additional requirements, both for the design of vessels and how they must operate in United States navigable waters. See Act of June 7, 1897, ch. 4, 30 Stat. 96 (adopting rules to prevent collisions in certain harbors, rivers, and inland waters); Act of Feb. 17, 1898, ch. 26, 30 Stat. 248; Act of Mar. 23, 1898, ch. 86, 30 Stat. 340 (extending licensing requirements to second and third mates who have watch duties); Act of May 28, 1908, ch. 212, 35 Stat. 424 (miscellaneous amendments).

treaty is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." *Id.* at 241-243. See also *Foster* v. *Davenport*, 63 U.S. (22 How.) 244 (1859) (invalidating state lightering requirement). Using a similar rationale, this Court held that attempts by a State to require its own vessel license were also preempted by federal licensing statutes.[9]

In the absence of a federal statute on the subject, however, the Court upheld state exercises of police power over certain localized maritime matters against challenges brought under the Supremacy Clause. See, *e.g.*, *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 315 (1852) (1789 statute, now codified at 46 U.S.C. 8501 and 8503, found to permit States to impose requirement of local pilot in state waters); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 581 (1875) (upholding state maritime lien law "until Congress interposes, and thereby excludes further State legislation"); *Kelly* v. *Washington ex rel. Foss Co.*, 302 U.S. 1, 4 (1937) (no extant federal regulation of motor tugs).

Thus, by the time Congress enacted the Tank Vessel Act in 1936, 49 Stat. 1889, which ushered in a complex twentieth-century national and international regulatory regime specifically addressing oil tankers, the preemptive scope of federal law was clear: a federal license authorizing vessel operations

[9] See *Moran* v. *New Orleans*, 112 U.S. 69, 75 (1884) (holding that a state law authorizing a city license fee "thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under, and which he derives from, the Constitution and laws of the United States"); *Harman* v. *Chicago*, 147 U.S. 396, 406-407 (1893) ("The requirement that every steam tug, barge or tow-boat towing vessels or craft for hire in the Chicago River or its branches shall have a license from the city of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city."); *White's Bank* v. *Smith*, 74 U.S. (7 Wall.) 646 (1869) (holding that state ship mortgage law was invalid under Supremacy Clause as in conflict with federal vessel statutes).

could not be interfered with, added to, or subtracted from, by state law, and federal laws and regulations governing vessels and their operations ousted competing state laws. Indeed, the Tank Vessel Act of 1936 was specifically intended to establish "a reasonable and *uniform* set of rules and regulations concerning ship construction, equipping, operation, and manning sufficient to ensure that vessels carrying the type of cargo deemed dangerous would meet all safety requirements plus such additional safeguards necessary to protect against the additional hazards created by the cargo and its handling." H.R. Rep. No. 2962, 74th Cong., 2d Sess. 2 (1936) (emphasis added) (quoted in part in *Ray*, 435 U.S. at 166). To that end, "[i]n order to secure effective provision against the hazards of life and property" created by tank vessels, the Tank Vessel Act authorized the promulgation of such additional federal rules and regulations as may be necessary with respect to such matters as the "design and construction, alteration, or repair of such vessels," "the operation of such vessels," and "the requirements of the manning of such vessels and the duties and qualifications of the officers and crews thereof." 49 Stat. 1889 (adding Rev. Stat. § 4417a(2), later codified at 46 U.S.C. 391a(2)).

B. Interstate And International Tanker Operations Are Subject To A Complex Regulatory Regime Of Preemptive Acts of Congress, International Agreements, And Federal Regulations

Against the foregoing historical background Congress enacted the Ports and Waterways Safety Act of 1972 (PWSA), 86 Stat. 424, and this Court decided *Ray* six years later. The Court in *Ray* construed Titles I and II of the PWSA to establish a set of principles for federal preemption of state rules with respect to a range of international vessel management requirements, undertaking a detailed, section-by-section analysis of each state provision to determine whether the particular state rule was preempted by a federal statute

or regulation addressing the same subject matter.[10] The question of preemption under the PWSA thus turns on an assessment of its distinctive titles.

1. ***Under* Ray *v.* Atlantic Richfield Co., *Title II Of The Ports and Waterways Safety Act, And Coast Guard Regulations Issued Pursuant To Title I Of That Act, Preempt State Laws Governing Tank Vessels***

a. Title II of the PWSA revised and reenacted the Tank Vessel Act of 1936 and conferred on the Secretary of Transportation, through the Coast Guard, rulemaking authority virtually identical to that in the 1936 Act. See 46 U.S.C. 391a(2) (Supp. V 1975). That Title governs issues generally concerned with the vessel itself—its "design, construction, alteration, maintenance, operation, equipping, personnel qualification, and manning." 46 U.S.C. 3703(a). Under Title II, the Secretary "must issue" regulations addressing those subjects, *Ray*, 435 U.S. at 161, to the extent deemed "necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." 46 U.S.C. 3703(a). Through such a comprehensive regulatory scheme, the Secretary, through the Coast Guard, can fashion a uniform national system of tanker regulation, not only to enhance navigation, safety, and environmental protection, but also to facilitate the free flow of interstate and foreign commerce, one of the central functions of the National Government under the Constitution. See pp. 18-19, *supra*; *Ray*, 435 U.S. at 165-

[10] Specifically, *Ray* held that federal law preempted state vessel regulations that required a tanker enrolled strictly in coastal trade to have a local pilot aboard, 435 U.S. at 158; imposed requirements on the design and construction of tankers in addition to the federal standards required under Title II of the PWSA to obtain certificates of compliance issued by the Secretary of Transportation, *id.* at 160-163; and imposed operating rules that differed from regulations issued by the Secretary under Title I of the PWSA, *id.* at 171-178.

166. A uniform set of rules for the United States also enables this Nation to "speak with one voice" on those subjects in the international community, with a view toward encouraging nations generally to adopt a regime that fully promotes the interests in safety, navigation, and environmental protection throughout the world. *Id.* at 166. Under such a system, as a vessel moves from State to State and between the United States and foreign ports, there can be assurance that a single set of standards will attach to both the physical aspects of the vessel itself and the duties and qualifications of its officers and crew. For those reasons, Title II essentially provides for preemption of the field in the areas to which it is addressed.

That conclusion is confirmed by the disposition of the preemption issue in the portion of the Court's opinion in *Ray* discussing Title II of the PWSA. The plaintiff there challenged laws adopted by the State of Washington that prescribed construction and design standards. See 435 U.S. at 160. The Court found those state laws to be preempted, holding that "Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements," and that "Congress did not anticipate that a vessel found to be in compliance with the Secretary's design and construction regulations and holding a Secretary's permit, or its equivalent, to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States on the ground that its design characteristics constitute an undue hazard." *Id.* at 163-164. The Court noted that the Tank Vessel Act of 1936 was intended to effect "a reasonable and uniform set of rules" on that subject, *id.* at 166 (quoting H.R. Rep. No. 2962, *supra*, at 2), and that the amendments to that Act made by Title II of the PWSA indicated that "Congress anticipated the enforcement of federal standards that would pre-empt state

efforts to mandate different or higher design requirements," *ibid.*

Although the *Ray* opinion addresses the preemption issue under Title II of the PWSA in terms of tanker design and construction, it did so only because those were the subjects of the claim before the Court. The Court's reasoning extends to all subjects addressed by Title II, including vessel operations, personnel qualifications, and manning. That is evident from the text of 46 U.S.C. 3703(a), which furnishes no basis for distinguishing among the various aspects of tanker regulation on that score; the background of Title II in the Tank Vessel Act of 1936 and its emphasis on uniformity in areas beyond tanker design and construction; the mandatory nature of the Secretary's duty to issue regulations; the practical need for there to be a single set of rules on board the vessel as it moves from State to State and Nation to Nation; and the congressional purpose of promoting uniform international standards where appropriate, which cannot realistically be advanced if ships are not subject to uniform rules even within the United States. Thus, as we explain below (see pp. 33-41, *infra*), the BAP rules adopted by Washington State that address tank vessel staffing, personnel qualifications, operations, and other matters governed by Title II of the PWSA are necessarily preempted.

b. By contrast, Title I of the PWSA governs issues generally involved with "traffic control at local ports," 435 U.S. at 161, a subject that does not necessarily call for uniform national standards. And Title I confers on the Secretary permissive, not mandatory, authority to promulgate regulations, *id.* at 171, governing such matters of local traffic control as the times for vessel movement, size and speed limitations, conditions for local operations, and pre-arrival notification, *id.* at 169-170. See 33 U.S.C. 1223, 1224; pp. 6-7, *supra*. The *Ray* Court held that with respect to operating rules of the type routinely thought of as "arising from the peculiarities of local waters that call for special precautionary measures" (*id.* at 171), "[t]he relevant [preemption] inquiry under Title I [of the PWSA] with respect to the State's power to impose [operating rules] is * * * whether the Secretary has either promulgated his own * * * requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all." *Id.* at 171-172. In those circumstances, the state rule must give way. *Id.* at 172; see also *id.* at 173-178. Otherwise, Title I does not preempt state rules governing local vessel traffic. See *id.* at 171-173.

In reaching that conclusion, the Court relied in part on a provision of Title I of the PWSA, which states that nothing in that Title I is to "prevent a State or political subdivision thereof from prescribing *for structures only* higher safety equipment requirements or safety standards than those which may be prescribed pursuant to [Title I]." 33 U.S.C. 1222(b) (Supp. V 1975) (emphasis added). See 435 U.S. at 170, 171, 174. The Court reasoned that the authorization to impose higher safety standards "for structures only"—*i.e.*, for structures along the shore that might affect vessel traffic —"impliedly forbids higher state standards for vessels." *Id.* at 174. The Court found this implication to be "strongly supported by the legislative history of the PWSA": "The House Report explains that the original wording of the bill did 'not make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field' and says that § 1222(b) was amended to provide 'a positive statement retaining State jurisdiction over structures and making clear that State regulation of vessels is not contemplated.'" *Ibid.* (quoting H.R. Rep. No. 563, 92d Cong., 1st Sess. 15 (1971)). See also 33 U.S.C. 1226(b) (current version of former Section 1222(b)). Accordingly, as we explain below (see pp. 33-41, *infra*), the BAP rules adopted by the State of Washington that address subject matters covered by Title I of the PWSA

are preempted if there is a Coast Guard regulation under Title I on the same subject.

c. On October 17, 1978, just seven months after this Court decided *Ray*, Congress enacted the PTSA, which revised and reenacted both Title I and Title II of the PWSA. See § 2, 92 Stat. 1471-1479 (Title I); § 5, 1480-1492 (Title II). Congress made no change of substance in the provisions of Title I and Title II that authorized the issuance of regulations, and upon which the Court relied in *Ray* to establish the framework for determining whether state laws regulating tank vessels are preempted. That subsequent enactment thus strongly supports adherence to the analytical framework of *Ray* in determining whether Washington's BAP rules are preempted. See *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 349-351 (1998); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

2. ***International Treaties And Maritime Agreements Also Have Preemptive Force***

In addition to identifying the preemptive scope of the PWSA, the Court in *Ray* also noted that in passing that Act, "Congress expressed a preference for international action and expressly anticipated that foreign vessels would or could be considered sufficiently safe for certification by the Secretary if they satisfied the requirements arrived at by treaty or convention." 435 U.S. at 167-168. Thus, to the extent an international agreement creates a standard that is embodied in Coast Guard regulations or is formally recognized by the Coast Guard as applicable, that standard will also preempt a contrary state law.

Since *Ray* was decided, the United States has also become party to numerous international agreements regulating tankers that independently have preemptive power over state laws. An international treaty can have just as much preemptive force as a federal statute. See U.S. Const. Art. VI. This Court has recognized that, "[u]nder principles of

international law, the word ['treaty'] ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force." *Weinberger* v. *Rossi*, 456 U.S. 25, 29 & n.5 (1982) (citing Restatement of Foreign Relations, Pt. III, introd. note at 74 (Tent. Draft No. 1, 1980)). Under international law, an international treaty or agreement is binding on all political subdivisions of the ratifying nation, and a party would not be excused from compliance because of the actions of a political subdivision.[11]

Because international agreements reflect the intentions of nation-states, this Court has emphasized that any concurrent power held by States in fields that are the subject of international agreements is "restricted to the narrowest of limits." *Hines* v. *Davidowitz*, 312 U.S. 52, 68 (1941). Thus, where the United States has exercised the authority of the Nation, a State "cannot refuse to give foreign nationals their treaty rights because of fear that valid international agreements might possibly not work completely to the satisfaction of state authorities." *Kolovrat* v. *Oregon*, 366 U.S. 187, 198 (1961). Accordingly, whether viewed through the lens of preemption by treaty or interference with the federal government's exclusive authority to conduct the foreign affairs of the United States, this Court has repeatedly struck down state laws that conflict with duly promulgated federal law touching on matters of international concern. See, *e.g.*, *Zschernig* v. *Miller*, 389 U.S. 429 (1968); *United States* v. *Pink*, 315 U.S. 203, 232 (1942); *United States* v. *Belmont*, 301 U.S. 324, 327 (1937).

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[11] See Vienna Convention on the Law of Treaties, May 23, 1969, arts. 27, 29, 1155 U.N.T.S. 331, 8 I.L.M. 679. Although the United States has not ratified the Vienna Convention, it is generally considered to be consistent with current treaty law and practice as recognized in the United States. See Restatement (Third) of the Law of Foreign Relations of the United States, Pt. III, introd. note at 144-145.

Those considerations have particular force in this case, because Congress has long recognized the importance of international rules in promoting safety and environmental protection in vessel operations. For example, although the Tank Vessel Act of 1936 contained a provision requiring vessels to carry a certificate of inspection evidencing compliance with the terms of the Act, it specifically provided that "the provisions of this subsection shall not apply to vessels of a foreign nation having on board a valid certificate of inspection recognized under law or treaty by the United States." 49 Stat. 1890. Congress included similar language in the PWSA, see § 201, 86 Stat. 429, 46 U.S.C. 391a(5) (Supp. V 1975), as amended by the PTSA, see § 5, 92 Stat. 1486-1487, 46 U.S.C. 3711.

As a result, under current law, a foreign vessel's compliance with international standards will satisfy domestic requirements for entering United States ports or waters. See, *e.g.*, 46 U.S.C. 3303 (Supp. III 1997) ("A foreign country is considered to have inspection laws and standards similar to those of the United States when it is a party to an International Convention for Safety of Life at Sea to which the United States Government is currently a party."); 46 U.S.C. 3711(a) ("The Secretary may accept any part of a certificate, endorsement, or document, issued by the government of a foreign country under a treaty, convention, or other international agreement to which the United States is a party, as a basis for issuing a [U.S.] certificate of compliance."). The certification requirements imposed by international conventions and codes such as the STCW Convention, MARPOL, ISM Code, and SOLAS require extensive enforcement efforts by the Coast Guard. See note 5, *supra*; 33 C.F.R. 151.01 (MARPOL), 96.100 (ISM Code); 46 C.F.R. 10.101(a)(2), 12.01-1(a)(2), 15.101 (STCW), 199.01(b) (SOLAS). With regard to SOLAS, for example, Congress has specifically provided that a SOLAS certificate shall be

respected by the United States, see 46 U.S.C. 3303 (Supp. III 1997), and by executive order the President has directed the Coast Guard to enforce SOLAS, see Exec. Order No. 12,234, 3 C.F.R. 277 (1981). The various provisions of SOLAS, MARPOL, STCW, and the ISM Code must be taken into account, in conjunction with Coast Guard regulations that implement those agreements, to assess whether individual state rules are preempted.[12]

As the Court emphasized in *Ray*, "[t]he Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment." 435 U.S. at 165. Congress no more intended to permit States to frustrate that federal purpose here, where the relevant certifications concern training, manning, and related policies, than it did in *Ray*, in which the Court specifically addressed design and construction standards. See *United States* v. *Belmont*, 301 U.S. at 331 ("In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.").

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[12] Congress has provided by statute that the ISM Code be enforced through applicable regulations, see 46 U.S.C. 3203(b) (Supp. III 1997). Similarly, the STCW Convention and its 1995 amendments have been implemented under United States law, see 137 Cong. Rec. S5731 (daily ed. May 14, 1991); 62 Fed. Reg. 34,506 (1997); 46 U.S.C. 3201 *et seq.*; as has MARPOL, see *Treaties in Force*, *supra*, at 407; *Status of Multilateral Conventions*, *supra*, at 280, 286; 126 Cong. Rec. 18,486-18,492 (1980). The STCW Convention is supplemented by an Annex and a Code that are integral parts of the Convention. See STCW Convention Art. I(1).

3. *Coast Guard Regulations Preempt Contrary State Rules*

This Court has "held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes." *Hillsborough County* v. *Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985). See also *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153-154 (1982); *California* v. *Zook*, 336 U.S. 725, 735-737 (1949). And, indeed, although "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law," *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 154, there is ample evidence from the PTSA and its predecessors that Congress intended the Coast Guard's rules to have primacy over conflicting state rules with respect to manning, training, and the other areas involved in this case, not merely with respect to construction and design.

First, "personnel qualification" and "manning" are specifically included in the list of subjects over which Title II of the PWSA has preempted the field. See 46 U.S.C. 3703(a). The PTSA further provides that the Secretary "shall issue regulations and procedures for the verification of manning, training, qualification, and watchkeeping standards promulgated by the certificating state of any foreign vessel which operates on or enters the navigable waters of the United States, and transfers oil or hazardous materials in any port or place under the jurisdiction of the United States." § 5, 92 Stat. 1488 (codified at 46 U.S.C. 9101(a)). The PTSA also confers authority on the Secretary to "modify any regulation or standard prescribed under this section to conform to the provisions of an international treaty, convention, agreement, or an amendment thereto, which is ratified by the United States," § 5, 92 Stat. 1489 (codified using slightly different language and merged into 46 U.S.C. 3703(a)), and to "withhold or revoke" clearance from the United States by any vessel that does not meet applicable standards, § 5, 92 Stat. 1489 (codified at 33 U.S.C. 1232(f) (Supp. III 1997)). Those provisions give ample authority to the Coast Guard to promulgate preemptive regulations implementing international agreements.

Second, Congress has long provided that, in promulgating regulations, the Coast Guard shall take into consideration the views of the States and port and harbor authorities. See 33 U.S.C. 1231(b)(2); 46 U.S.C. 3703(c)(2). Those provisions plainly do not contemplate that—after the Secretary has considered the States' views, taken international standards and other relevant factors into account, and elected to adopt uniform national standards on a particular subject—the States are then free to adopt divergent laws on the very same subject.

C. Certain Of The Washington Best Achievable Protection (BAP) Rules Are Preempted By Federal Law

The court of appeals found *none* of the state rules regarding staffing and operations preempted, without regard to whether they differed from federal regulations that were promulgated by the Coast Guard pursuant to statutory and international treaty authorities.[13] The result is to leave in place a number of Washington regulations that are inconsistent with federal law and specific international standards. Of the 15 BAP rules challenged in petitioner Intertanko's complaint, the vast majority should have been (but were not) held preempted by the court of appeals. The following examples are drawn for illustrative purposes, and are not intended to compose an exhaustive list of the Washington regulations that raise such concerns:

– *Drug and Alcohol Testing and Reporting*: The Washington regulations require extensive drug and alcohol testing

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[13] The only regulation held preempted by the court below concerned requirements for installation of particular equipment. See Pet. App. 26a-29a, 35a.

of all crew members on tankers, including foreign-flag vessels. Wash. Admin. Code § 317-21-235 (1999). Those regulations further mandate that the results of a positive drug test be reported to Washington within 72 hours of the confirmed test result. The state requirements appear to apply to a drug test conducted anywhere in the world for a vessel that weeks or months in the future might arrive in Washington waters. Washington's requirement of random testing of all crew members on all of the vessels operated by a carrier throughout the world creates a different rule from the Coast Guard's standards, which require post-accident and reasonable-cause testing requirements for foreign-flag vessels. See 46 C.F.R. 4.05-12; *id.*, Subpt. 4.06; *id.* Pt. 16; 33 C.F.R. 95.035.[14] Moreover, numerous foreign governments, including the Government of Canada, have informed the Coast Guard that their laws might not allow the testing of individuals in accordance with the Washington state requirements. See 59 Fed. Reg. 65,500-65,501 (1994); 57 Fed. Reg. 31,274 (1992); 56 Fed. Reg. 18,982 (1991); 53 Fed. Reg. 47,070-47,071 (1988). Indeed, even under United States law, the random testing of individuals is limited to those individuals aboard vessels who occupy safety-sensitive positions that are specifically identified in the regulations. 46 C.F.R. 16.230; see also 56 Fed. Reg. 31,030 (1991) (noting concerns based on

[14] A comprehensive comparison of the state BAP rules to the federal and international standards is set forth in App., *infra*, at 1a-17a. Although the international regime generally authorizes the flag nation to determine that vessels are manned appropriately, crews are qualified, and vessels are seaworthy, the STCW Convention provides guidelines for the prevention of drug and alcohol abuse by recommending that administering parties develop national legislation prescribing a maximum 0.08% blood alcohol level during watchkeeping as a minimum safety standard on ships and prohibiting the consumption of alcohol within four hours of serving as a member of a watch. See STCW Code, § B-VIII/2, Pt. 5.

Fourth Amendment protections against unreasonable searches and seizures).

– *Crew Training Policies*: The Washington regulations require "training beyond the training necessary to obtain a license or merchant marine document." Wash. Admin. Code § 317-21-230 (1999). That provision constitutes a "personnel qualification" within the field preemptive ambit of 46 U.S.C. 3703(a). It also imposes requirements in addition to those of the STCW Convention, which provides that a certification by a flag state will be afforded respect through reciprocity in the United States. See STCW Convention, Arts. VI, X. The Coast Guard has promulgated extensive regulations on the licensing and qualifications of maritime personnel. See 46 C.F.R. Pts. 10, 12, 13, 15; see also 33 C.F.R. 155.1055, 157.152, 157.154. To meet the State's requirements, a crew would have to be flown in advance to Washington for training or otherwise extra-territorially meet acceptable state standards, before serving on a voyage to Washington waters. That requirement would often be impractical given the commercial realities of international shipping, in which vessels are frequently re-routed in mid-voyage to new destinations for the pickup or delivery of cargo. The practical effect of the Washington intrusion into international training requirements is that, unless the additional state training requirements have been met, foreign and U.S. flag vessels alike are precluded from entering Washington waters.[15]

– *Language Proficiency Requirements*: The Washington BAP rules require that "[a]ll licensed deck officers and the vessel's designated person in charge under 33 CFR sec.

[15] Notwithstanding the State's contention that we are "simply wrong" (Br. in Opp. 27) in noting that the training requirements imposed by the State exceed national and international standards, the BAP rule details specific additional requirements that must be included in "a comprehensive training program approved by the [O]ffice [of Marine Safety]." Wash. Admin. Code § 317-21-230(1) (1999).

155.700 are proficient in English and speak a language understood and spoken by subordinate officers and unlicensed crew." Wash. Admin. Code § 317-21-250(1) (1999). That provision is a "personnel qualification" within the preemptive field of 46 U.S.C. 3703(a). See also 33 U.S.C. 1228(a)(7) (requiring vessel, while underway in U.S. waters, to have at least one licensed deck officer on the bridge capable of clearly understanding English). In addition, the international requirements that the United States has agreed to observe, by contrast, require an officer in charge of the navigation watch to be able to "perform the officer's duties * * * with a multilingual crew." See STCW Code, Tab. A-II/1, Col. 2, *English language*. The STCW standard requires licensed deck officers to be able to communicate with those who are part of the navigation watch, and only on those matters relevant to watch-keeping duties. The Washington regulations, on the other hand, require *all* licensed deck officers to speak the languages of the entire unlicensed crew, a requirement that imposes substantial additional burdens on ship owners and operators. The STCW standards must be met to achieve certification, see STCW Code, §§ A-II/1, A-III/1, A-V/1, and the Coast Guard has the authority to accept an STCW certificate of compliance. See 46 U.S.C. 3303, 8702(b) (designated percentage of crew that must understand an order "spoken by the officers" before a vessel may be allowed to operate in United States waters), 9101, 9102 (1994 & Supp. III 1997); 33 C.F.R. 155.710(c)(4), 161.12(b), 161.18(c); 46 C.F.R. 13.201(g), 15.730.

– *Management Policies and Practices*: The Washington regulations contain a series of requisites concerning management practices for a vessel, including personnel training and the types of elements that must be contained in an approved management program. Wash. Admin. Code § 317-21-260(1) to (3) (1999). That requirement constitutes an impermissible personnel qualification within the scope of the field

preempted by 46 U.S.C. 3703(a). The state rule also directly conflicts with 46 U.S.C. 3203(a) (Supp. III 1997), which provides that "[t]he Secretary shall prescribe regulations which establish a safety management system for responsible persons and vessels to which this chapter applies." Section 3203(b) further provides that "[r]egulations prescribed under this section shall be consistent with the International Safety Management Code with respect to vessels engaged on a foreign voyage." See also 46 U.S.C. 9102(a)(5). The federal regulations, which set forth in detail the requisite management practices that must be followed by vessel operators, enforce the ISM Code. See 33 C.F.R. Pt. 96; ISM Code, §§ 1.4, 2, 6.2, 7, 10. See also 46 C.F.R. 12.02-17(e), 13.125, 15.1107.[16]

– *Operating Procedures; Restricted Visibility*: The Washington BAP rules require three licensed deck officers on watch during times of restricted visibility, one of whom may be a state-licensed pilot when the vessel is in pilotage waters. Wash. Admin. Code § 317-21-200(1)(a) (1999). That requirement constitutes a "manning" requirement within the field of subjects covered by 46 U.S.C. 3703(a), which *Ray* has held preempts state rules, as well as a standard authorized by 33 U.S.C. 1223 (1994 & Supp. III 1997), which would be subject to the type of Title I analysis utilized in *Ray*. The state rule also diverges from the Coast Guard requirement of two licensed deck officers. See 33 C.F.R. 164.13(c) (regulation implementing OPA § 4116(b), codified at 46 U.S.C. 8502(h)); 58 Fed. Reg. 27,632 (1993) (expressing intent to preempt state rules). Because crews are staffed to meet international standards, the Washington rules also necessarily interfere with the accomplishment of another international

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[16] For similar reasons, we view the BAP rule concerning personnel evaluations also to be preempted by the Coast Guard regulations and applicable ISM standards. See Wash. Admin. Code § 317-21-240 (1999).

standard: ensuring that watch officers obtain at least ten hours of rest in any 24-hour period, which must be provided in "no more than two periods, one of which shall be at least 6 hours in length." STCW Code, § A-VIII/1. To comply with both the state personnel watch requirements and the international crew-rest standards, therefore, any vessel destined for Washington waters (or in transit through those waters) must increase its crew complement or fly additional personnel to the vessel prior to entering Washington waters, in order to comply both with the state personnel watch requirements and the international crew rest standards. The State has asserted that the conflict is of minimal practical consequence because the BAP rule applies only to "the 60 miles between buoy J and Port Angeles where pilotage waters begin." Br. in Opp. 26. Given the State's own estimate of the speed at which vessels normally travel (see *id.* at 4), a vessel would ordinarily take four hours to travel that distance, and those hours necessarily would encroach into the mandated rest period.[17]

– *Advance Notice of Entry*: The state rules contain a series of requirements for advance notice to be given to state officials prior to the entry of a vessel into state waters. See Wash. Admin. Code § 317-21-540 (1999). Those requirements are preempted using the type of analysis this Court used in *Ray* for permissive regulations promulgated under then-Title I of the PWSA. See *Ray*, 435 U.S. at 169-170. The Secretary "may control vessel traffic in areas subject to the jurisdiction of the United States which the Secretary determines

[17] In addition to its authority to implement the STCW Convention, the Coast Guard has legal authority to promulgate its navigation watch and lookout regulations pursuant to Section 5 of the PTSA, 46 U.S.C. 3703, which, among other statutory provisions, requires the Coast Guard to develop manning requirements for vessels. See also 33 U.S.C. 2005 (requiring lookout by sight); 46 U.S.C. 8101(a)(3), 8104(n), 9101 (evaluation of foreign vessel compliance with manning requirements).

to be hazardous, or under conditions of reduced visibility, adverse weather, vessel congestion, or other hazardous circumstances by * * * specifying times of entry, movement, or departure." 33 U.S.C. 1223(a)(4); see also 33 U.S.C. 1223(a)(5). Under *Ray*, if the Coast Guard had not issued regulations, the State's rule would not be preempted. See 435 U.S. at 172. The Coast Guard *has* issued regulations governing advance notice of entry, however, thereby preempting the State's effort to regulate that facet of vessel operations. See 33 C.F.R. 156.215; *id.* Pt. 160, Subpt. C; see also UNCLOS, Art. 25(2).

– *Event Reporting of Marine Casualties*: The Washington rules require a vessel owner or operator to provide "an event summary of the past five years for each vessel covered by an oil spill prevention plan," with detailed information for each casualty, collision, allision, or near-miss, regardless of where in the world the event occurs. Wash. Admin. Code § 317-21-130 (1999). The rule also imposes an obligation on the owner or operator to send a report within 30 days of the event, even if the vessel operator has no contemporaneous expectation that its vessel will travel to Washington. That state rule is preempted by 46 U.S.C. 6101, which imposes on the Secretary the obligation of prescribing regulations for the reporting of marine casualties. See also 46 U.S.C. 6301 *et seq.* Section 5 of the PTSA also provides that "[t]he Secretary shall establish a marine safety information system" which, among other data, shall include "the history of marine casualties and serious repair problems of the vessel." 46 U.S.C. 3717(a)(4). Pursuant to those statutory authorities, the Coast Guard has promulgated regulations for marine casualty event reporting. See 33 C.F.R. 151.15, 151.26(b)(3), 153.203, 155.1035(b), 164.61; *id.*, Pt. 173, Subpt. C; 46 C.F.R. 4.05-1 to 4.05-10, 35.15-1. Various international agreements also contain requirements for event reporting. See

MARPOL 73/78, Art. 8; *id.* Protocol I; IMO Res. A.851(20); SOLAS Convention, Annex, Ch. V, Reg. 8-1.

– *Emergency Procedures*: The state rules require proficiency in a range of subjects during an emergency. See Wash. Admin. Code § 317-21-220 (1999). Those requirements are preempted by national and international standards, see 33 C.F.R. Tab. 96.250(h), 151.26(b)(4), 155.1035; 46 C.F.R. Pt. 35, Subpt. 35.10; *id.* 199.80; STCW Code, Tab. A-II/2 (qualification requirement for master of vessel), and are personnel qualifications preempted under 46 U.S.C. 3703(a). The need for uniformity is particularly apt in emergency response operations, to avoid confusion by a vessel's crew over differentiations in rules between the international/ national regime on the one hand and variant state rules on the other.

Operating Procedures—Pre-Arrival: The BAP rules impose a wide range of pre-arrival tests of such equipment as navigation instruments, generators, steering systems, engines, and other mechanical systems. See Wash. Admin. Code § 317-21-215 (1999). All of those requirements impose standards to test the performance of equipment, a subject within the preemptive field of 46 U.S.C. 3703. See *Ray*, 435 U.S. at 163-164. The Coast Guard has promulgated regulations addressing the equipment standards the State seeks to impose. See 33 C.F.R. 164.25, 164.35, 164.53; 46 C.F.R. 35.20-10; *id.*, Pt. 61, Subpt. 61.20. Those federal regulations are consistent with international standards requiring uniformity. See SOLAS Convention, Annex, Ch. II-1, Regs. 44, 46(2), 49; *id.* Ch. V, Reg. 19-2.

Under the proper analysis, therefore, the vast majority of the Washington BAP rules are preempted as coming within the field of preemptive subjects embraced within 46 U.S.C. 3703 recognized in *Ray* or as conflicting with treaty obligations and Coast Guard regulations recognized and promulgated by federal statutes.[18]

D. The Court Of Appeals' Analysis Upholding The State Rules Is Flawed

There can be no doubt that the Washington regulations discussed above are preempted under the analysis mandated by this Court's decision in *Ray*, as applied to the post-*Ray* statutory scheme created by Congress and the international regime accepted by the United States. The court of appeals did not disagree. The court believed, however, that, following the enactment of OPA in 1990, the Coast Guard no longer has the authority to issue regulations that would preempt state regulations addressing the same subject matter. That conclusion is deeply flawed.

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[18] In the court of appeals, we expressed the view that Sections 317-21-205 and 317-21-210 of the Washington BAP rules "raise no serious preemption issues." U.S. C.A. Br. 54. Upon further consideration, we have concluded that the view expressed in that brief may not be correct. Section 317-21-205 requires a vessel in state waters to record its position every 15 minutes. In 1976, however, the Coast Guard considered a similar requirement, see 41 Fed. Reg. 18,767-18,769, and concluded that such a rule could not be justified, see 42 Fed. Reg. 5957 (1977). See 33 C.F.R. 164.11(c)-(e); 46 C.F.R. 15.1109; STCW Code, § A-VIII/2, Pt. 3-1(24-28). See also *Ray*, 435 U.S. at 171-172 (federal decision not to issue regulation has preemptive effect if Secretary "has decided that no such requirement should be imposed at all"). Section 317-21-210 requires that certain standby generators will be on and running while the vessel is in state waters, the assumption apparently being that the main electrical system is not sufficiently reliable. That requirement raises a preemption question involving the interplay between equipment operability and rules pertaining to local traffic. Coast Guard regulations generally govern equipment standards, but do not address the precise question of standby generators being turned on in particular circumstances. Section 317-21-210 nevertheless could be thought to encroach on the regulatory field concerning vessel equipment, see 33 C.F.R. 164.11-164.25; 46 C.F.R. Pts. 111, 112. The validity of those two rules, as well as others that we have not specifically discussed in this brief, may be considered by the courts below on remand.

1. Contrary to the court of appeals' view, nothing in OPA affects *Ray*'s holding that the Coast Guard has authority to issue regulations that preempt state rules on the same subject. It would be surprising indeed for Congress to have deprived the Coast Guard of that power to adopt uniform national standards, since, as the district court acknowledged, "shipping has traditionally been governed by federal law." Pet. App. 61a. And, in fact, the Conference Report on OPA specifically states that OPA "does *not* disturb the Supreme Court's decision in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978)." H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. 122 (1990) (emphasis added); see also H.R. Conf. Rep. No. 854, 104th Cong., 2d Sess. 135 (1996) (report on Coast Guard Authorization Act of 1996, citing *Ray* for proposition that Secretary has authority to promulgate regulations to promote federal vessel uniformity).

Significantly, moreover, OPA did not amend the provisions of the PWSA—which were relied upon by the Court in *Ray*, 435 U.S. at 161, 170, were expanded after *Ray* in the PTSA, and are now codified at 33 U.S.C. 1231 and 46 U.S.C. 3703—that authorize and direct the Secretary to issue regulations governing design, construction, alteration, repair, maintenance, operation, equipment, personnel qualification, and staffing of tanker vessels. Those statutory provisions identify a role for the States in the process of developing governing standards: they require the Secretary to consult with and "consider[] the views" of "officials of State and local governments." 33 U.S.C. 1231(b)(2); 46 U.S.C. 3703(c)(2). But this Court has already construed the language in 46 U.S.C. 3703 to afford field preemption of state rules. See *Ray*, 435 U.S. at 163-165.

In addition, Title IV of OPA makes plain that Congress intended to reinforce, not undermine, the established regime of international uniformity and reciprocity on such issues as staffing, training, and operation. Thus, Congress specifically

directed the Secretary of Transportation to evaluate the "manning, training, qualification, and watchkeeping standards of a foreign country that issues documentation" to tankers, in order to determine whether they are "at least equivalent to United States law or international standards accepted by the United States"; and Congress provided that the Secretary may prohibit entry into the United States of vessels with documentation issued by countries that do not maintain and enforce such standards. OPA § 4106(a), 104 Stat. 513 (codified at 46 U.S.C. 9101(a)). That directive to the Secretary of Transportation refutes the Ninth Circuit's conclusion that Congress, in enacting OPA, subordinated the need for international uniformity and reciprocity to the divergent policy preferences of the States. Cf. Pet. App. 16a.[19]

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[19] One exception to the principle of reciprocity is a requirement that certain foreign-flag tankers must be double-hulled to enter United States waters. See 46 U.S.C. 3702(a), 3703a (1994 & Supp. III 1997). The Ninth Circuit attributed great importance to Congress's decision to promulgate that requirement in OPA notwithstanding the absence of an international rule, concluding that Congress's actions indicate that "strict international uniformity with respect to the regulation of tankers is not mandated by federal law and that international agreements set only minimum standards." Pet. App. 18a (internal quotation marks and brackets omitted). The court of appeals missed the significance of the fact that Congress itself enacted the double-hulling requirement and that it did so by *amending* the governing federal statutory framework. That specific and carefully drawn exception reinforces the conclusion that, with respect to the other subjects on which Congress has *not* acted, the authority of the Coast Guard to issue regulations that conform to international standards and preempt state rules that fail to do so was not affected by OPA. Nothing in that focused amendment supports the court of appeals' holding that *States* may ignore the international regime with impunity. That holding is fundamentally at odds with the law of preemption, and it threatens the ability of the United States to speak with one voice and to comply with its international obligations because it permits state regulatory requirements that are inconsistent with each other, as well as with the federal and international system. Indeed in 1990, there existed no international requirement for a double hull on tankers, and thus Congress

2. In holding that the Coast Guard no longer has the power recognized in *Ray* to issue regulations having preemptive effect, the court of appeals relied almost exclusively on Section 1018 of OPA. See Pet. App. 16a. But as the court recognized elsewhere in its opinion, see *id.* at 12a, Section 1018 addresses only the preemptive effect of "*this* Act"—*i.e.*, of OPA itself—not the preemptive effect of *other* federal statutes, such as the PWSA, at issue in *Ray*, and the post-*Ray* enactment of the PTSA. *Ibid.* The court of appeals' holding thus boils down to the notion that, even though Section 1018 neither applies to other federal statutes such as the PTSA nor alters the Secretary's rulemaking authority under it, Section 1018 nevertheless has a sort of penumbral effect that divests the Coast Guard of the power it previously had to issue preempting regulations under those other federal statutes. Simply to state the proposition is to refute it. Under the Constitution, Congress could divest the Coast Guard of that power under prior law only by enacting a new law that repealed that prior authority. See *INS* v. *Chadha*, 462 U.S. 919, 955 (1983). Congress did not do that in OPA.

Properly understood, Section 1018 expresses an intent for OPA not to displace whatever police powers States otherwise might have *independent* of OPA. Thus, whether state tanker laws are preempted turns on the vast body of federal treaty, statutory, and regulatory provisions governing tanker operations. As we have demonstrated, every federal rule that preempts a Washington BAP regulation derives from a source of law independent of OPA: the PWSA, PTSA,

in OPA presaged subsequent international action. In 1993, MARPOL was amended to include a double hull requirement, which is similar to but not identical to the requirement under United States law. See MARPOL Annex I, Regs. 13F, 13G.

SOLAS, STCW, MARPOL, ISM Code, and Coast Guard regulations issued pursuant to those authorities.[20]

3. The court of appeals' erroneous reliance on Section 1018 of OPA also underlies its further (and equally erroneous) holding that Coast Guard regulations that are otherwise valid require additional legislative authority to have preemptive effect. See Pet. App. 29a-31a. That decision is incorrect in at least two important respects. First, 33 U.S.C. 1231 and 46 U.S.C. 3703 confer broad authority on the Coast Guard, after "considering the views" of the State and balancing competing considerations, to prescribe regulations for the design, construction, operation, equipping, personnel qualification, and staffing of tank vessels. Those provisions, which are unaffected by OPA, furnish ample authority for Coast Guard regulations that preempt conflicting state rules.

[20] Although the parties and courts below extensively addressed the effect of OPA Section 1018 on the preemptive scope of other provisions of OPA itself—*e.g.*, whether Section 1018 applies only to Title I and not to Title IV-A, or whether its references to "requirements" "relating to discharges" would cover the sorts of vessel and personnel standards prescribed by the Coast Guard regulations that govern here—the Court need not decide those interpretive issues concerning Section 1018 to resolve this case. That is so because, as we have said in the text, all of the Coast Guard regulations are supported by authority outside of OPA. We note, however, that the application of Section 1018 to sections in Title IV of OPA is not clear, as the double hull requirement illustrates. Section 4115(a) of OPA establishes a requirement that certain tanker vessels be equipped with a double hull. 104 Stat. 517; 46 U.S.C. 3703a(a). It would be a bizarre reading of Section 1018 to permit a State to flout that congressional judgment by requiring a vessel to contain a *triple* hull before it could legally enter state waters. Thus, notwithstanding the Section 1018 savings provisions, other sections of OPA may nonetheless have implied preemptive effect. See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) (Congress did not intend to "undermine this carefully drawn statute through a general saving clause"); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 329-331 (1981) (general savings clause should not be construed to produce direct conflict with directive in federal statute).

Moreover, as this Court held in *Ray*, the Secretary already had authority under those provisions of the PWSA to issue regulations that preempt state regulatory efforts. Congress was not required to confer that authority all over again in OPA.

Second, and more fundamentally, Congress need not specifically confer preemptive authority on a federal agency for that agency's rules to have preemptive effect. In *City of New York* v. *FCC*, 486 U.S. 57 (1988), for example, this Court explained that "a narrow focus on Congress' intent to supersede state law is misdirected, for a pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Id.* at 64 (internal quotation marks and brackets omitted). In identifying "the correct focus" of a regulatory preemption inquiry, the Court left no doubt that "statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *Ibid.*; accord *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154 (1982) ("A pre-emptive regulation's force does not depend on express congressional authorization to displace state law.").[21]

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[21] In some instances the Coast Guard has expressly stated that its regulations do *not* preempt state rules. See, *e.g.*, 61 Fed. Reg. 1080-1081 (1996) (vessel oil spill response plan regulations); *id.* at 7917. In other cases, it has left no doubt that its regulations are intended to preclude state regulations touching the same subject. 63 Fed. Reg. 71,770 (1998); 62 Fed. Reg. 67,506 (1997); 58 Fed. Reg. 27,632 (1993). Even in the absence of an express statement by the Coast Guard, however, state rules are preempted where Congress has intended Coast Guard regulations to occupy the field, or where the Coast Guard has issued rules on a particular subject.

E. The Decision Below Hinders The United States' Ability To Promote Environmentally Sound Practices In The International Rulemaking Regime

The competing legal regime erected by Washington poses substantial and immediate diplomatic concerns for the United States in several critical respects. First, the existence of state regulations that conflict with international standards raises the distinct possibility that other nations that are parties to international conventions and agreements will regard the United States as in violation of its obligations and thus take actions that will undermine international uniformity. The United States Department of State has received a diplomatic note from 13 nations (Belgium, Denmark, Finland, France, Germany, Greece, Italy, Japan, the Netherlands, Norway, Portugal, Spain, Sweden) and the Commission of the European Community expressing concerns that "[d]iffering regimes in different parts of the US would create uncertainty and confusion. * * * The Governments therefore urge the US to pursue a regulatory regime, on a national basis, which is consistent with agreed international standards." Note Verbale from the Royal Danish Embassy to the U.S. Department of State 1 (June 14, 1996) (File No. 60 USA.1/4). On May 7, 1997, the Government of Canada submitted a similar diplomatic protest. Letter from the Embassy of Canada to the U.S. Department of State 1 (Note No. 0389). Those countries represent major maritime trading nations, significant allies of the United States, and leaders in establishing international vessel standards. A decision by other nations that the United States is in noncompliance with an international treaty obligation could lead to the abrogation of the agreement, a decision not to afford reciprocity to United States tankers in foreign ports, and consider-

able uncertainty in the legal regime governing international vessel management.[22]

Second, the conflicting Washington regulations undermine the credibility of the United States in negotiating international agreements that promote safe use of tankers around the world. The culmination of such negotiations has had, and will continue to have, significant desirable consequences for shipping and environmental safety in United States coastal waters and those of our trading partners. For that kind of diplomatic bargaining to result in agreements that other nations will enforce, however, the United States negotiators must be assured that they can represent the *entire* United States, and not be undermined by the actions of individual States that depart from the international regime. Because of the international nature of the shipping industry, the establishment of vessel standards for safety and environmental protection is generally most effective when carried out on an internationally cooperative level rather than by individual nations or political subdivisions of those nations acting on

[22] A specific example of the principle of reciprocity that is undermined by the Washington BAP rules is the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (CVTMS Agreement), Dec. 19, 1979, U.S.-Can., 32 U.S.T. 377, which provides that a foreign vessel transiting United States waters en route to a Canadian port need not comply with United States laws if it complies with comparable Canadian laws and regulations. Congress specifically authorized the President to enter into such agreements. See 33 U.S.C. 1230(b)(1). The Washington BAP regulations recognize no reciprocity with Canadian rules for such transiting vessels, and such rules raise the specter that Washington will deny entry into United States waters of vessels that comply with the CVTMS Agreement, even those bound only for Canadian ports. The court of appeals erred in declining to consider that issue, see Pet. App. 19a, even though it elsewhere noted that Intertanko had raised concerns about the effect of the state BAP rules on the CVTMS Agreement, see *id.* at 17a. See also U.S. C.A. Br. 13, 39-40.

their own. See, *e.g.*, S. Treaty Doc. No. 39, 103d Cong., 2d Sess., at III (1994).[23]

If the Ninth Circuit decision were affirmed, every coastal State in the United States could adopt and enforce its own requirements, notwithstanding their inconsistency with the regulations of other States and the international community (as reflected in federal statutes and regulations). The consequences of state-by-state variations in tanker regulations could be highly problematic. Different States could impose different watch manning requirements, and tankers would have to comply with different sets of regulations (in addition to the federal scheme) when traveling in United States coastal waters, even if those requirements are mutually conflicting and even if the vessel is not even bound for a United States port. The multiplicity of overlapping regulatory requirements would further frustrate the substantial international interest in uniform vessel standards in such interna-

[23] Particularly as they relate to manning, the BAP rules also raise a serious question of their consistency with the international law accepted by the United States regarding the right of innocent passage, which is critical to the free passage of U.S. military and civilian flag vessels at various places around the world. The right of innocent passage provides that a coastal nation's laws and regulations may not be applied to the design, construction, manning, or equipment of foreign vessels transiting in innocent passage through another nation's territorial sea unless they are giving effect to generally accepted international rules or standards, and that coastal nations may not impose requirements on foreign ships that have the practical effect of denying or impairing the right of innocent passage. See, *e.g.*, Convention on the Territorial Sea and the Contiguous Zone, Geneva, Apr. 29, 1958, 15 U.S.T. 1606, art. 15(1); UNCLOS, § 3, arts. 17, 21(2), 24(1)(a), 25(2); 33 U.S.C. 1230; 33 C.F.R. Pts. 160, 164. The court below erred in declining to consider that issue. See U.S. C.A. Br. 40-41. Although the right of innocent passage does not alter a coastal nation's right to impose regulations as a condition of port entry, such conditions must be consistent with that country's other international legal obligations.

tional conventions and codes as SOLAS, STCW, MARPOL, and the ISM Code.

* * * * *

Many of the state BAP rules discussed above (see pp. 33-41, *supra*) operate in fields that have been preserved by Congress for exclusive federal regulation, while others are preempted by Coast Guard regulations or international agreements to which the United States is a party. The judgment of the court of appeals should be reversed to the extent the Court holds those particular BAP rules preempted. In other respects, the judgment of the court of appeals should be vacated and the case remanded to allow the courts below to assess the validity of the remaining regulations under the proper preemption analysis, as set forth in this brief.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
317-21-130 EVENT REPORTING	Information Reports	33 U.S.C. §1321(b)(5) 33 U.S.C. §1906 46 U.S.C. §3717 (PTSA §16) 46 U.S.C. §§6101-6102 33 CFR Table 96.250(i)(2)-(3) 33 CFR §§151.15, 151.26(b)(3) 33 CFR §153.203 33 CFR §155.1035(b) 33 CFR §161.12(c) 33 CFR §164.61 33 CFR Part 173, Subpart C 46 CFR §§4.05-1-4.05-10 46 CFR §35.15-1	MARPOL 73/78 Article 8 MARPOL 73/78 Protocol I IMO Resolution A.648(16) SOLAS Chap. V, Regulation 8-1 IMO Resolution A.851(20)
317-21-200 WATCH PRACTICES			
(1)	Manning	46 U.S.C. §3703 46 U.S.C. §8101(a)(3) 46 U.S.C. § 8502(h) 46 U.S.C. §§9101, 9102 33 CFR §164.13(c), (d) 46 CFR §15.1109	SOLAS Chapter 5, Regulation 13(a) STCW Regulation VIII/2 (2.1) STCW Code A-VIII/2 (9, 15, 16-17, 45)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
(1)(a)	Manning	46 U.S.C. §3703 46 U.S.C. §8101(a)(3) 46 U.S.C. §8104(n) (OPA 90 §4114(b)) 46 U.S.C. §§9101, 9102 33 CFR §164.13(c), (d) 46 CFR §15.1109	SOLAS Chapter V, Regulation 13(a) STCW Regulation VIII/2-(2.1) STCW Code A-VIII/2 (16-17)
(1)(b)	Manning	46 U.S.C. §3703 46 U.S.C. §8101(a)(3) 46 U.S.C. §8104(n) 46 U.S.C. §§9101, 9102 33 U.S.C. §2005 46 CFR §10.903(c) 46 CFR §35.20-20 46 CFR §15.850 46 CFR §15.1109	COLREGS Rule 5 STCW Regulation II-4 STCW Code Table A-II/1 (pg 30) STCW Code Table A-II/3 (pg 61) STCW Code Table A-II/4 (pg. 68) STCW Code A-VIII/2 (13-15, 45.2)
(1)(c)	Navigation Operations	46 U.S.C. §3703 46 CFR §§113.30-5(g), 113.30-25	None
(1)(d)	Information Collection	No specific requirement. Similar to 46 CFR Subpart 35.07	None

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
(2)(Preamble)	Operational Procedures	33 CFR §157.415 46 CFR §10.205(o) (after 2/1/2002)	STCW Code B-VIII/2 (4-5) (guidelines only)
(2)(a), (c)-(f)	Operational Procedures	46 CFR §10.205(o) (after 2/1/2002) 46 CFR §10.901(c) 46 CFR §10.903(c) 46 CFR §15.1109	STCW Code Table A-II/1 (pg 30) STCW Code Table A-II/2 (pg 44) STCW Code A-VIII/2 STCW Code B-VIII/2 (4-5) (guidelines only)
(2)(b), (3)	Operational Procedures	33 CFR §164.11(k) 33 CFR §168.60 46 CFR §15.1109	STCW Code A-VIII/2 (49, 50)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
2(g)	Operational Procedures	33 CFR §§161.18, 161.19-161.23 33 CFR §165.100(d)(3) (63 FR 71764 (Dec 30, 1998)) (NY, NE only)(towboats only). National rulemaking in progress (towboats only). *See* 62 FR 52063 (Oct. 6, 1997)) Reg project to be complete mid-2000 46 CFR §10.903(c) 46 CFR §15.1109	STCW Code Table A-II/1 (pg 27) STCW Code Table A-II/2 (pg 41) STCW Code Table A-II/3 (pg 58) STCW Code A-VIII/2 Part 2
(4)	Manning/ Operational Procedures	46 CFR §35.05-15 33 CFR §155.810 33 CFR 164.13(b)(underway) 46 CFR §15.1109	STCW Code A-VIII/2 (51.4) (anchored) STCW Code A-VIII/2 (102-103) (in port)
(5)	Manning	33 CFR §164.19 46 CFR §15.1109	STCW Regulation VIII/2.4 STCW Code A-VIII/2 (51)
(6)	Manning	33 CFR §164.13(b) 46 CFR §15.825(b) 46 CFR §15.1109	STCW Regulation VIII/2.3 STCW Code A-VIII/2 (54-55)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
317-21-205 OPERATING PROCEDURES -NAVIGATION			
(1)	Navigation Procedures	33 CFR §164.11(c) - (e) *See also* 42 FR 5957 (Jan. 31, 1977) 46 CFR §15.1109	STCW Code A-VIII/2 (24-28)
(2)	Navigation Procedures	33 CFR §§161.18, 161.19-161.23 33 CFR §165.100(d)(3)) (63 FR 71764 (Dec 30, 1998)) (NY, NE only)(towboats only). National rulemaking in progress (towboats only). See 62 FR 52063 (Oct. 6, 1997)) Reg project complete mid-2000 46 CFR §10.903(c) 46 CFR §15.1109	STCW Code Table A-II/1 (pg 27) STCW Code Table A-II/2 (pg 41) STCW Code Table A-II/3 (pg 58) STCW Code A-VIII/2 Part 2

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
(3)	Navigation Procedures	33 U.S.C. §1223(a)(4)(D) 33 CFR §164.11(i) 46 CFR §10.903(c) 46 CFR §15.1109	STCW Code Table A-II/2 (pg 43) STCW Code A-VIII/2 (21.5.2, 34.2)
(4)	Navigation Procedures	None	None
(5) RESERVED	Navigation Procedures	OPA 90 § 4116(c) 33 U.S.C. § 1223 33 CFR § 168.40 Potential additional rule-making being studied. See P.L. 104-58, Title IV; 63 FR 64937 (Nov. 24, 1998)	None
(6) RESERVED	Operational Procedures	None. Potential rulemaking being studied. *See* P.L. 104-58, Title IV; 63 FR 64937 (Nov. 24, 1998)	None

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
317-21-210 OPERATING PROCEDURES ENGINEER-ING			
(1)	Equipment Operation Procedures	46 U.S.C. §3703 33 CFR §164.25(a)(3) 46 CFR Part 112, *n.b.* §§112.25-3, 25-5, 25-10	SOLAS Chapter II-1, Regulation 44
(2)	Manning / Operational Procedures	No similar reg. 33 CFR §§164.11(t), 164.13(b) and 46 CFR Subpart 58.25 combine to create similar regime.	Analogous to SOLAS Chapter V, Regulation 19-1
(3)	Equipment Operation Procedures	46 U.S.C. §3703 No specific regulations.	None
(4)	Equipment Operation Procedures	46 U.S.C. §3703 Somewhat analogous to 46 CFR §§ 35.25-10 and 58.01-10	None

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
317-21-215 OPERATING PROCEDURES -PREARRIVAL		Entire regulation, generally: 33 U.S.C. §1223 46 U.S.C. § 3703	
(1)	Navigation Equipment	33 CFR §§164.35 and 164.53 combine to create similar regime. 46 CFR §10.903(c)	STCW Code Table A-II/1 (pp. 27-28) STCW Code Table A-II/3 (pp. 58-59)
(2)	Equipment Operation	33 CFR §164.25(a)(3) 46 CFR §110.30-5	SOLAS Chapter II-1, Regulation 44
(3)	Equipment Operation	33 CFR §164.25(a)(1) 46 CFR §35.20-10 46 CFR §61.20-1	SOLAS Chapter V, Regulation 19-2
(4)	Equipment Operation	33 CFR §164.25(a)(5) 46 CFR §61.20-3	SOLAS Chapter II-1, Regulations 46(2), 49
(5), (6)	Equipment Operation	46 CFR §61.20-3(a)	SOLAS Chapter II-1, Regulation 46
(7)	Equipment Operation	46 CFR §61.20-3(a)	None
(8)	Equipment Operation	46 U.S.C. §3703 Somewhat analogous regs at 46 CFR §§ 35.25-10 and 58.01-10	None

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
(9), (10)	Equipment Operation	46 CFR §61.20-3(a)	SOLAS Chapter II-1, Regulation 46
317-21-220 EMERGENCY PROCEDURES			
(1)	Manning	46 CFR §199.80 (b)	STCW Code Table A-II/2 (pg 54) STCW Code A-VIII/1 (5) SOLAS Chapter III, Regulations 8, 37
(2), (3)	Watchstanding Procedures	33 CFR Table 96.250(h) 33 CFR §151.26(b)(4) 33 CFR §155.1035 46 CFR Subpart 35.10 46 CFR §199.80 (b)(3)	SOLAS Chapter III, Regulations 8, 35, 37 STCW Code A-I/14 (2.1.2) STCW Code Table A-II/1 (pp. 36-37) STCW Code Table A-II/2 (pg 54) SOLAS Chapter III, Regulation 8 MARPOL Annex I, Regulation 26(2)(c)
317-21-225 EVENT RECORDS	Records	33 CFR §164.61 46 CFR §4.05-15 46 CFR §35.15-1	SOLAS Chapter. I, Regulation 21 SOLAS Chapter V, Regulation 20 (pending change will require voyage data recorders)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
317-21-230 TRAINING	Personnel Certification	Entire regulation, generally: 46 U.S.C. §3703 46 USC §7101 46 U.S.C. §8703 46 USC §§9101, 9102 46 CFR Parts 10, 12, 15	STCW, generally
PREAMBLE	Personnel Certification	46 USC §7101 46 CFR §10.101 46 CFR §15.1103 46 CFR §35.05-1	STCW Convention Article III
(1)	Personnel Certification	46 U.S.C. §7101(e) – (i), 46 U.S.C. §§8101, 8301(a) and 46 CFR §15.401 combine to create similar regime.	STCW Code I/14 (1.1)
(2)	Personnel Certification	33 CFR Table 96.250(f)(5) 46 CFR § 15.405 46 CFR §15.1105	SOLAS Chapter III, Regulation 19.4 ISM Code §6.3 STCW Regulation I/14.4 STCW Regulation VI/1 STCW Code A-I/14 STCW Code A-V/1 STCW Code A-VI/1 STCW Code B-I/14 (guidelines only)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
3(a)	Personnel Certification	33 CFR §155.1055 46 CFR Part 10 Subparts D, E & I 46 CFR Part 13	STCW Code A-II/2 STCW Code A-III/2 STCW Code A-III/3 STCW Code A-V/1
3(b)	Personnel Certification	46 CFR Part 10 Subparts D & I 46 CFR Part 13	STCW Code A-II/1 STCW Code A-II/3 STCW Code A-V/1
3(c)	Personnel Certification	33 CFR §155.1055 33 CFR §§157.152, 154 46 CFR Part 10 Subparts E & I 46 CFR Part 13 46 CFR §39.10-11	STCW Code A-III/1 STCW Code A-V/1
3(d)	Personnel Certification	46 USC §7301 46 USC §8701 46 CFR Parts 12, 13	STCW Code A-II/4 STCW Code A-III/4 STCW Code A-V/1
(4)	Personnel Certification	46 USC §7106 46 U.S.C. §9102(a)(6) 46 CFR §10.209 46 CFR §15.1105(c)(2)	STCW Regulation I/11(3-4) STCW Code A-I/11 STCW Code A-VI/1 (2.2)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
(5)	Personnel Certification	33 CFR §155.230((b)(2)(iv) (towboats only)(See 63 FR 71764 (Dec. 30, 1998)) 33 CFR §155.1060 46 CFR §35.10-1 46 CFR §199.180	SOLAS Chapter III, Regulation 19.3 SOLAS Chapter V, Regulation 19.2(d)
317-21-235 DRUG & ALCOHOL USE	Personnel Certification	Generally: 33 CFR Part 95 46 CFR Part 16 49 CFR Part 40	STCW Code B-VIII/2 (34-36) (guidelines only)
(1)	Personnel Certification	46 U.S.C. § 8101(i) 33 CFR §95.045 46 CFR §16.101 46 CFR §35.05-25	No specific regulations
(2)	State Pilots	None	None
(3)(a)	Personnel Certification	46 U.S.C. §7101(i) 46 U.S.C. §7302(e) 46 CFR §16.210	No specific regulations
(3)(b)	Casualty Investigations	46 U.S.C. §2303a 46 CFR Subpart 4.06 46 CFR §16.240	No specific regulations

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
(3)(c)	Personnel Certification	33 CFR §95.035 46 CFR §16.250	No specific regulations
(3)(d)	Personnel Certification	46 CFR §16.230	No specific regulations
(4)	Drug Testing	46 CFR Part 16, Subpart C 49 CFR §40.31	No specific regulations
(5)	Drug Testing	46 CFR §16.260 (record retention) 46 CFR §16.500	No specific regulations
(6)	Drug Testing	46 CFR §16.201(c) (U.S. personnel only)	No specific regulations
(7)	Drug Testing	46 CFR §16.105	No specific regulations
(8)	Drug Testing	46 CFR §16.230(e), (f)	No specific regulations
317-21-240 PERSONNEL EVALUATION	Personnel Certification		
(1)	Personnel Certification	46 U.S.C. §8101(i) 46 CFR §§35.05-20, 25	STCW Regulation VIII/1.2
(2)	Personnel Certification	None	None. Somewhat analogous to STCW Regulation I/14 (1.3)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
317-21-245 WORK HOURS	Manning	46 U.S.C. §3703 46 U.S.C. §8104(a), (d) 46 U.S.C. §8104(n) (OPA 90 §4114(b)) 46 CFR §§15.705 – 710; 15.1111	STCW Code A-VIII/1 (1 – 3) STCW Code B-VIII/1 (guidelines only)
317-21-250 LANGUAGE			
(1)	Personnel Certification	46 U.S.C. §3703 46 U.S.C. §8702(b) 46 U.S.C. §§9101, 9102 33 CFR §155.710(c)(4) 33 CFR §§161.12(b), 161.18(c) 46 CFR §13.201(g) 46 CFR §§15.730	SOLAS Chapter III, Regulation 35 SOLAS Chapter V, Regulation 13(c) (currently passenger vessels only; pending change will apply reg to all vessels) STCW Table A-II/1 (pg 34) STCW Table A-II/4 (pg 68) STCW Table A-III/1 (pg 75)
(2)	Operating Procedures	33 CFR Table 96.250(f)(8) 33 CFR §155.740(b) 33 CFR §155.1030(b)	SOLAS Chapter III, Regulation 35 SOLAS Chapter V, Regulation 13(c) (currently passenger vessels only, pending change will apply reg to all vessels) STCW Code A-I/14 (2.2)

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
317-21-255 RECORD KEEPING			
(1)	Personnel Certification	46 USC §§ 9101 - 9102 46 CFR §10.304(e-h) 46 CFR §12.03-1(a)(8, 12) 46 CFR §15.1107(b)	STCW Regulation. I/14 (1.3) STCW Code B-II/1 (4.3, 5.4.3) (guidelines only)
(2)	Manning	46 CFR §15.1111(g)	Analogous to STCW Code A-VIII/1 (5) STCW Code B-VIII/1 (4) (guidelines only)
317-21-260 MANAGE-MENT			
(1) Management Oversight	Management procedures, policies, and practices	46 U.S.C. 3203 (Supp. III 1997) 33 C.F.R. §§ 96.210 - 230	ISM Code §§1.4, 7, 9, 10 SOLAS Chapter I, Regulation 11(a)
	Personnel Certification	46 U.S.C. 3203 (Supp. III 1997) 33 C.F.R. §§ 96.210 -230. 46 CFR §15.1107(b)	ISM Code §1.4 STCW, generally

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
	Personnel Certification	46 U.S.C. §9102(a)(5) 46 CFR §15.1107(a) 46 CFR §10.205(d) 46 CFR §12.02-17(e) 46 CFR §13.125	ISM Code §6.2 STCW Regulation I-9 analogous STCW Regulation I/14
	Management	None.	None.
	Management	46 U.S.C. 3203 (Supp. III 1997) 33 CFR §§ 96.210 - 230.	ISM Code §1.4
(2)	Management	Analogous to: 46 U.S.C. § 3203(a) (Supp. III 1997) 33 CFR §§96.220 – 230.	Analogous to ISM Code, generally
(3)	Management	46 U.S.C. § 3203(a)(1) (Supp. III 1997) 33 CFR Table 96.250(a)	ISM Code §§1.4.1, 2
(4)	Management	None. However, companies unlikely to be ISM certified by USCG without a vessel visit program in place.	None

BAP REG	CATEGORY	Federal Statute Federal Regulation	International Treaty
(5)	Maintenance	46 U.S.C. §3313(a) 46 U.S.C. §9102(a)(8) 33 CFR Table 96.250(j)	SOLAS Chapter I, Regulation 11(a) SOLAS Chapter III, Regulation 36
317-21-265 TECHNOLOGY			
(1)(a)	Navigation Equipment	33 U.S.C. §1223(a)(3) 46 U.S.C. 3703-3708 33 C.F.R. §164.41	SOLAS Chapter V, Regulation 12 (pending change)
(b)	Navigation Equipment	33 U.S.C. §1223(a)(3) 46 U.S.C. 3703-3708 33 C.F.R. §164.35 33 C.F.R. §164.37(a) 33 C.F.R. §164.38	SOLAS Chapter V, Regulation 12(h)-(j)
(2)(a)-(c), (3)	Operation of Equipment	33 U.S.C. §1223(a)(3) 33 C.F.R. §§155.230 (as revised at 63 FR 71754, 71763 (Dec 30 1998) 33 CFR §155.235	SOLAS Chapter 2-1, Regulation 3-4)
317-21-540 ADVANCE NOTICE OF ENTRY	Navigation Operations	33 USC §1223(a)(5) 33 CFR §156.215 33 CFR §§160.201 - 215	UNCLOS Article 25(2)

(23) (24)

Nos. 98-1701 & 98-1706

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

-and-

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

v.

GARY LOCKE, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County; K. CARL LONG, Prosecutor of Skagit County; JAMES H. KRIDER, Prosecutor of Snohomish County; NORMAN MALENG, Prosecutor of King County; WASHINGTON ENVIRONMENTAL COUNCIL; NATURAL RESOURCES DEFENSE COUNCIL and OCEAN ADVOCATES,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF ON THE MERITS FOR RESPONDENT-INTERVENORS

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SUMMARY OF ARGUMENT

The internal waters of Washington State are among the most productive and fragile natural resources in the world. These waters are continually threatened by the increasing number of foreign oil tankers in Puget Sound and the possibility of a catastrophic oil spill. Washington's Best Achievable Protection regulations (BAP regulations) are a direct result of that threat and the failure of the United States Coast Guard to enact and enforce regulations to protect against an oil spill as required by federal law.

The BAP regulations are a valid exercise of the state's police powers for the purpose of protecting its marine environment from the catastrophic effects of an oil spill. The right of Washington to enact oil spill regulations concurrent and complementary with the federal government is critical to a balance of federalism necessary to allow individual states the autonomy envisioned by the Tenth Amendment.

Neither the Constitution nor prudent public policy requires that Washington State rely upon overextended and under budgeted federal officials for the protection of one of the most environmentally productive and sensitive ecological systems in the world. So long as Washington's BAP regulations are not in actual conflict with international treaties or Coast Guard regulations, the exercise of the state's police powers for the preservation of its environment may not be usurped.

Many jurisdictions have no regulations concerning protection against oil spills. As to those jurisdictions, federal regulations and/or international treaties continue to control. Just as the federal constitution exists as a floor beneath which the quality of individual rights may not fall, federal regulations and treaties exist as a floor beneath which environmental protection may not fall. Individual states, however, may provide for greater protection.

The Government asserts that Washington's BAP regulations impair or undermine the Government's ability to enter into international treaties. The Government, however, does not have

the right to bargain away by treaty the state's traditional police powers to preserve the health and safety of its citizens. This is exactly what the Government is attempting to do.

In an attempt to expand the Government's power and authority, Petitioners assert that the BAP regulations are maritime in nature. They are not. The Oil Pollution Act (OPA) and the Washington BAP regulations are environmental regulations, and not maritime. The BAP regulations are expressly authorized by the savings clause of OPA (Section 1018) which is modeled after the Clean Water Act and not by Title 46 of the U.S. Code or the Ports Waterways and Safety Act. Section 1018 of OPA is an explicit recognition that oil spill prevention is most reliably achieved by authorizing individual states to enact their own prevention regulations so long as they do not actually conflict with federal law.

The genius of federalism within the environmental context allows the states to be laboratories of experimentation in which various policies are debated, implemented and then refined. Innovative and better ways of protecting the public health, safety and environment will be the result of allowing states to enact their own oil spill prevention regulations.

There is no actual dispute alleged involving any tank vessel and any state regulation. There exists no evidence in this record that any vessel entering the internal waters of Washington was prevented from doing so, hindered in doing so, or subjected to enforcement because of a conflict between state and federal regulations. This court should not entertain hypothetical claims involving preemption.

No actual conflict exists between the BAP regulations and federal statutes or international treaties. The Washington BAP regulations are "reasonable, nondiscriminatory conservation and environmental protection measures." These are exactly the type of regulations acknowledged in *Ray v. Atlantic Richfield*, 435 U.S. 151 (1978). The international uniformity so highly valued by the Petitioners is a myth. Moreover, the international treaties are not self-executing, and therefore have no preemptive effect.

ARGUMENT OF COUNSEL

A. The history of tanker regulations designed to protect the environment.

The history of the oil tanker is marked with a series of landmark events, the first of which was the expansion of the Russian oil market in the late 1880s. The first successful bulk tanker, the *Zoroaster*, set sail in 1878 on the Caspian Sea. Yergin, D., *The Prize: The Epic Quest for Oil, Money and Power*, Simon & Schuster, 59 (1992).

After World War II, there was a substantial increase in the number and size of oil tankers transiting the high seas. Ellis, E., *International Law and Oily Waters: A Critical Analysis*, 6 Colo. J. Int'l. Envt'l L. & Pol'y 31, 36 (1995). In response to the unprecedented growth of international trade, the United Nations established the 1958 Convention on the Intergovernmental Maritime Consultive Organization (IMO). 9 U.S.T. 621, T.I.A.S. No. 4044. The Convention introduced the first international body designed to address global shipping concerns.[1]

Prior to 1969, there were no international agreements which addressed the environmental consequences of an oil spill. Ellis, *supra* at 34-35.[2] Tankers were primarily governed

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1. Protection of the environment under the Convention was merely a contingent benefit to vessel safety. M'Gonigle, *supra*, at 41. The objective of IMO was, *inter alia*, "[t]o provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation." IMO Convention, Art. I. IMO served the interests of commerce and the shipping industry; the Convention was silent on pollution control. M'Gonigle, at 41.

2. Intentional discharges of oily ballast water was a common tanker practice throughout the first half of the 20th Century. It was (Cont'd)

by an assortment of non-uniform regulations, the majority of which were self imposed by the industry. M'Gonigle, R. and Zacher, M., *Pollution, Politics and International Law: Tankers at Sea*, University of California Press, 39 (1979).

1. The *Torrey Canyon* oil spill.

The emergence of the "supertanker" in the 1960s proved to be the defining factor spurring international action to address the threat of oil pollution. By the late 1960's, supertankers of 200,000 dwt were in operation and by the early 1970s tankers of over 400,000 dwt were in operation. De La Rue, C. and Anderson, C., *Shipping and the Environment: Law and Practice*, Lloyd's of London Press 10-11 (1998). On March 18, 1967, the supertanker *Torrey Canyon* struck rock off the coast of Cornwall, England carrying a cargo of 120,000 tons of crude oil. *Id.* Within days she broke into three separate pieces creating a scale of pollution without precedent; the spill fouled beaches over a hundred miles throughout the British and French regions of Cornwall, Normandy and Brittany. M'Gongile, at 144.[3] As a result of the *Torrey Canyon* oil spill, the United States rejected efforts by the maritime industry to await the development of international standards, and acted independently of international efforts. The rejection of international efforts was in large part based upon consideration of the rights of individual states to enact regulations for the protection of their local environment.[4]

(Cont'd)
not until 1954 that these deliberate discharges became subject to international regulations. International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL), 12 U.S.T. 2989, 327 U.N.T.S. 3. OILPOL was significantly limited in scope and intent; OILPOL did not prohibit intentional oil discharges but generally required that they be made outside of 50 miles from coastal zones. *Id.*, Art. III.

3. *See also Askew v American Waterways Operators, Inc.*, 411 U.S. 325, 333-335 fn 5 (1973) (describing the Torrey Canyon oil spill and the growth of oil tankers).

4. "Although efforts were made by the maritime industry to postpone [Congressional] hearings on new domestic legislation (Cont'd)

2. The Water Quality Improvement Act and Clean Water Act Amendments.

In the wake of the *Torrey Canyon*, Congress enacted the 1970 Water Quality Improvement Act (WQIA), 33 U.S.C. § 1161 *et seq*. WQIA generally created a national policy prohibiting the discharge of oil into U.S. waters and imposed strict liability for all clean-up costs incurred by the federal government. The Act also imposed limitation on the vessel owner's liability and required larger tankers to display evidence of financial responsibility up to statutory limits. Section 1161.

The WQIA introduced the early blueprint of OPA's savings clause: "Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State." WQIA § 1161(o)(2). This savings clause is virtually indistinguishable from OPA § 1018(a). Although incidentally applying to maritime matters, WQIA § 1161(o)(2) was held to be outside the scope of the federal presence in general maritime law. *See Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973).

Unfortunately, it soon became clear that the WQIA was not accomplishing its objective of lowering the level of pollution in U.S. waters. De La Rue, at 23. Congress responded in 1972

(Cont'd)
pending the adoption of an international convention, the US State Department refused to support any request for postponement. Secondly, given the strong economic position of the US, it was widely felt that the country could act independently of other nations in formulating its oil spill policy. A third factor, *destined to plague all future efforts to achieve an international solution to the problem of marine oil pollution, was the reluctance to accept an international regime that might prevent individual states from establishing their own liability and compensation laws for discharges of oil within their jurisdiction. This reluctance, emanating from the states' need to maintain autonomy within the federal system, was founded on a strong belief that individual states were in the best position to determine the most effective way to protect their citizens in environmental matters.*" De La Rue, at 22 (emphasis added).

by amending the Federal Water Pollution Control Act, or Clean Water Act (CWA). 33 U.S.C. § 1251 *et seq.* The CWA also contains a savings clause upon which OPA § 1018(a) was modeled: "Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State." CWA § 311(o)(2).

3. The *Exxon Vadez* oil spill.

During the mid-1970s, Congress began to consider various bills to revamp the national system of oil spill liability regimes within the WQIA, the CWA, the Deep Water Port Act, 33 U.S.C. § 1501 *et seq.*, and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et. seq.*

On March 24, 1989, the *Exxon Valdez* ran aground in Price William Sound carrying more than 53 million gallons of Alaskan crude oil. The grounding resulted in the release of over eleven million gallons of oil, the worst oil spill disaster the United States has ever experienced. De La Rue, at 55. *Exxon Valdez* galvanized global public attention on an unprecedented scale. Approximately 190 lawsuits were filed in the District Court of Alaska, 212 were filed within Alaska state courts and the federal government brought federal criminal charges against Exxon. *Id.*

Following the spill in Alaska, oil spread over parts of 1,300 miles of coastline in Prince William Sound, the Kenai and Alaska Peninsulas, and the Kodiac Archipelago. Some 2,800 sea otters died; those that managed to survive could be seen swimming through the water covered in oil. An estimated 300 harbor seals were killed by the oil, and seal population levels fell by as much as 30 percent in areas tainted by the spill. Harlequin ducks did not reproduce in Prince William Sound for over three years following the spill. Salmon, herring, and shellfish were tainted by the oil, leading to oil contamination of animals which prey on them. Many marine animals were genetically damaged. Roughly a quarter of a million sea birds died. The bodies of

250 bald eagles, 395 loons and 838 cormorants were discovered. Numerous killer whales disappeared from Prince William Sound and many of those are presumed dead; one group or "pod" lost almost half of its members (14 of 36). These statistics represent only the losses that have been confirmed by scientists and clean-up crews. Exxon Valdez Trustee Council, *Exxon Valdez Oil Spill Restoration Plan: Update on Injured Resources and Services*, January 1999.[5]

It was not only a broad spectrum of wildlife that was damaged by the *Exxon Valdez* disaster. People were adversely affected, as well. Professional fishermen suffered distressing economic losses as fisheries were closed in 1989. While most fisheries opened again in 1990, the Prince William Sound herring fishery was forced to close again in 1993 due to an injured herring population, and remains closed today. The tourist industry in the spill area has suffered ongoing losses. The loss of wildlife has limited the recreational appeal of the spill area, and oil still covers parts of beaches once enjoyed by tourists. Restrictions on sport fishing and hunting to protect injured fish, animal and bird populations similarly harm tourism. *Id.*[6]

On February 10, 1999, the Alaska Wilderness League released a new report declaring Prince William Sound's wildlife

5. There are eight species that continue to be listed as not recovering 10 years after the spill: common loons, cormorants (pelagic, double-crested and red-faced), harbor seals, harlequin ducks, killer whales and pigeon guillemots.

6. "The Trustee Council determined that the 'human services' of commercial fishing, subsistence, recreation/tourism, and passive use will have recovered when the injured resources on which they depend are once again healthy and productive. Since that level of recovery has not been achieved, each of these services is considered to be recovering." *See also* Picou and Gill, The Exxon Valdez Oil Spill and Chronic Psychological Stress, *American Fisheries Society Symposium* 18:879-893 (1996) ("Chronic stress was documented for communities affected by the spill and for members of occupational groups most dependent on commercial fishing"). *See* Trustee Council 10 Year Report at http:// www.oilspill.state.ak.us/injury/notrecov.htm.

and ecosystem unrecovered. As the report points out, "the Office of Technology Assessment [has] estimated that cleanup has recovered 3 to 4 percent of the spill. Substantial contamination and depressed population . . . of wildlife persists." The Seattle Times reported on October 5, 1998: "Lingering oil from the 1989 grounding of the *Exxon Valdez* supertanker in Prince William Sound will kill or stunt Alaskan pink salmon for generations to come, government scientists say. Long lasting hydrocarbon components of the crude oil will cause chronic harm to successive generations." *Id.*

4. Passage of The Oil Pollution Act of 1990.

As a direct consequence of the *Exxon Valdez* oil spill, Congress passed the Oil Pollution Act of 1990. Congress recognized that the preexisting legislation was inadequate to prevent catastrophic oil spills. The prevention of oil spills is now accomplished through a comprehensive integration of liability, compensation and vessel standards. OPA serves to remove the patchwork of oil spill prevention measures by placing them into a comprehensive, environmentally oriented statute.[7]

OPA is an environmental statute which explicitly recognizes that regulation by individual states is the best and historic source for innovative environmental protection. This explicit recognition is contained in the savings clause of Section 1018, which authorizes the states the right to enact oil spill regulations for the protection of their local environments.

5. The Coast Guard's failure to enact and enforce regulations required by OPA explains the necessity of state regulation.

Intertanko argues that the State and their supporters may disagree with the sufficiency of the regulatory scheme, but that

7. "[A]ny oil spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment. Consequently, *preventing* oil spills is more important than containing and cleaning them up quickly." S. Rep. No. 94, 101st Cong., 2nd Sess. 2 (1989) *reprinted in* 1990 U.S.C.C.A.N. 722, 723 (emphasis added).

disagreement is not of constitutional import. Intertanko Brief at 29 fn 18. Intertanko is correct on both issues. Although the insufficiency, lack of implementation and poor enforcement by the Coast Guard is not of constitutional import, the Coast Guard's failure to comply with the requirements of OPA for the enactment and implementation oil spill prevention regulations explains the perceived necessity by the states to enact oil spill prevention regulations of their own.[8]

OPA is intended to "address the many shortcomings of the existing patchwork of laws on oil spills." Sen. Rept. No. 101-94, 2, July 28, 1989. The act charged the United States Coast Guard with the rulemaking authority to implement most of the measures mandated by Congress within OPA. Exec. Ord. No. 12777, Section(d)(2). Over the last nine years, however, the Coast Guard has failed to adequately promulgate regulations for oil spill prevention and response as required by OPA.

A principal goal of OPA is to compel a process by which working oil tankers will function with double hulls. 46 U.S.C. § 3703(a). The process of using only double-hulled tankers cannot be implemented immediately, however, and Congress allowed for a phase-out period for single-hulled tankers of 25 years, until 2015. *See* OPA § 4115.[9]

8. On August 7, 1997, a number of environmental organizations (including the Natural Resources Defense Council, Ocean Advocates, American Littoral Society, Baykeeper, Clean Ocean Action, New Jersey Public Interest Research Group Citizen Lobby, Inc and Public Interest Research Group of New Jersey, Inc.) filed suit against the Coast Guard for its failure to promulgate interim structural measures for existing ships, as well as its refusal to require tank level pressure monitoring devises in contravention of OPA. The merits of the case were not reached, as it was dismissed on jurisdictional grounds. *Natural Resources Defense Council Inc. et al, v. United States Coast Guard, et al* No. 97-3910 (JCL) USDC New Jersey. *See also Natural Resources Defense Council Inc., et al. v. United States Coast Guard, et al.* No. CV-94 4892RJD (E.D. N.Y. 1994).

9. The double hull tankers mandated by Congress are inconsistent with MARPOL. Congress was willing to sacrifice

(Cont'd)

Recognizing that until the phase-out period is complete there will be grave dangers posed by still-operating single-hulled oil tankers, Congress included in OPA a mandate for the Coast Guard to reduce that threat by promulgating a series of interim measures to prevent oil spills, and to create effective response measures in the event of a spill. Under section 4115(b) of OPA, the Coast Guard is required to promulgate structural and operational measures for single-hulled tank vessels carrying over 5,000 gross tons of oil that will provide as substantial protection to the environment as is economically and technologically feasible. Recognizing the immediacy of the threat, Congress required these measures to be promulgated by August, 1991. *Id.* "The goal of this provision [requiring structural and operational measures] is to ensure that the environment is protected as quickly as possible from oil spills." H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. (Aug. 1, 1990).

In 1993, two years after the deadline for issuing structural and operational measures had passed, the Coast Guard drafted a Notice of Proposed Rule Making entitled "Structural and Operational Measures to Reduce Oil Spills from Existing Tank Vessels Without Double-Hulls." 56 FR 54870, October 22, 1993. In 1995, the Coast Guard then withdrew its 1993 proposal. 60 FR 67226, December 28, 1995. In 1996, approximately five years after the Congressional mandate, the Coast Guard finally issued rules for operational measures. 61 FR 39770 (1996). Unfortunately, the rules were minimal and only addressed issues such as lightering equipment, enhanced survey programs, and maneuvering performance capability tests. 61 FR 39788-91. These operational measures are minor, of limited importance, and largely mirror prevailing industry practice. They do not remotely comply with the Section 4115(b) requirement that the Coast Guard must provide the greatest feasible protection

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international uniformity in the name of greater protection from oil spills. The Ninth Circuit relied upon this Congressional intention. 148 F.3d at 1063.

against pollution from oil spills by tank vessels. No structural interim measures were enacted at all, thereby making the operational measures all the more important.

Perhaps the most significant failure within the context of this case is the Coast Guard's failure to provide for tug escort vessels for 70 miles in the Strait of Juan de Fuca west of Port Angeles. Section 4116 of OPA provides authority to require a minimum of two escort vessels for laden single hull oil tankers of 5,000 GT operating in Prince William Sound and Puget Sound. Despite the fact that Puget Sound is particularly identified in the statute as in need of tug escorts, the Coast Guard has failed to require tug escorts west of Port Angeles.

The Coast Guard has also failed to implement key spill response measures, including salvage and firefighting requirements; on-water response capacities; and on board containment and removal equipment. The Coast Guard Re-Authorization Act of 1993 specifically instructed the Coast Guard to test and evaluate technology that could be carried safely aboard tankers. Pub. L No. 105-383, 112 Stat. 3411 (1993). It also required that a report be sent back to Congress within a maximum of two years on the feasibility and environmental benefits relating to tanker oil spill response equipment. *Id.* Six years later that report has still not been provided.

Since the passage of OPA, almost a decade ago, oil tankers have continued to operate without the safeguards required by Congress. Many oil spills are reported every year. Although these incidents are not always widely publicized, they nonetheless harm the environment and quality of life of American citizens.[10]

10. *E.g.*, In March 1996, a barge in the Housting Ship Channel almost split in two, spilling 714,000 gallons of oil into Galveston Bay. Mick Drago, *Associated Press*, March 19, 1996. In January 1996, off the coast of Rhode Island, the North Cape barge had to be abandoned after the tug towing it caught fire; 820,000 gallons of #2 fuel were spilled into the water. Dennis Hevesi, *The New York Times*, February 12, 1995. In January 1994, a barge ran aground in Puerto

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B. Washington's Best Achievable Protection regulations are a legitimate exercise of its traditional police powers reserved to the states by the Tenth Amendment.

Washington's BAP regulations are a valid exercise of its police powers for the purpose of protecting its marine environment from the catastrophic effects of an oil spill. The right of Washington to enact oil spill regulations concurrent and complementary with the federal government is critical to a balance of federalism necessary to allow individual states the autonomy envisioned by the Tenth Amendment.[11]

Neither the Constitution nor prudent public policy requires that Washington State rely upon overextended and under

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Rican waters after its towing cable broke; 750,000 gallons of oil spilled into the ocean off a popular beach area. Press Release by Guillermo Gill, U.S. Attorney, April 25, 1996; In August 1993, three ships collided in the main channel leading into the Port of Tampa Bay, spilling 328,000 gallons of oil into the water; an even larger amount of oil caught on fire, seriously polluting the air in this highly populated area. "Collisions and Oil Spill in Tampa Bay," (based on newspaper articles and the account in *Golob's Oil Pollution Bulletin*). In addition, many incidents that do not result in actual spill are not publicized.

11. The decentralization of power associated with the traditional sovereignty of states implicates the most basic concepts of a free and democratic society.

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty.

Gregory v. Ashcroft, 501 U.S. 452, 458-459 (1991). *See also United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy concurring) ("State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power' ").

budgeted federal officials for the protection of one of the most environmentally sensitive ecological systems in the world. Fundamental concepts of federalism require that Washington State be able to protect and regulate the quality of its own environment. So long as Washington's BAP regulations are not in conflict with international treaties or Coast Guard regulations, the exercise of the State's police powers for the preservation of its environment can not be usurped.

Many jurisdictions have no regulations concerning protection against oil spills. As to those jurisdictions, federal regulations and/or international treaties continue to control; the BAP regulations do not usurp the authority of the Coast Guard in State waters, rather they reasonably complement the federal requirements. Much like the federal constitution itself, federal regulations and treaties exist as a floor beneath which environmental protection may not fall. As with state constitutional rights, however, individual states may provide for greater protection. *See* Utter, *Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 Pug. Sound. L. Rev. 491, 495 (1984); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501-502 (1977).

The Tenth Amendment confirms "that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. 144, 157 (1992). The Tenth Amendment encompasses "any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution." *South Carolina v. Baker*, 485 U.S. 505, 511 fn. 4 (1992). Under modern analysis, the question is whether the State has exercised its police power in conformity with federal laws and the Constitution. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 342-43 (1977); *Reid v. Covert*, 354 U.S. 1, 15-18 (1957) ("The prohibitions of the Constitution were designed to apply to all branches of the

National Government, and they cannot be nullified by the Executive or by the Executive and the Senate combined"). Federal maritime law has long accommodated the States' interest in regulating environmental protection, although the regulation may have an incidental effect on maritime affairs.[12]

Whether or not the enactment of state regulations may hypothetically result in some "Balkanization" is entirely besides the point.[13] What the Petitioners decry as the evil of

12. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 215 fn.3 (1996) ("States have thus traditionally contributed to the provision of environmental and safety standards for maritime activities"); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917) ("[I]t would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied"); *Huron Portland Cement Co. v Detroit*, 362 U.S. 440, 442 (1960) ("In the exercise of [police powers], the states . . . may act, in many areas of . . . maritime activities"); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 97-1337 (1999) ("Although States have important interests in regulating wildlife and natural resources within their borders, *this authority is shared with the Federal Government* when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making") (emphasis added); *International Paper Company v. Ouellette*, 479 U.S. 481, 502 (1987) (Brennan concurring and dissenting) ("This traditional interest of the affected State, involving the health and safety of its citizens, is protected by providing for application of the affected State's own tort laws in suits against the source State's polluters"); *Kelly v. Washington ex rel Foss Co.*, 302 U.S. 1, 10 (1937) ("The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together' "); *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 435-36 (1976) (Stewart, dissenting) ("The Court has never struck down a state law on the ground that the States are jurisdictionally incompetent to legislate over matters that occur within the ocean 'territory.' ").

13. *See Hughs v. Oklahoma*, 441 U.S. 322, 342 (1979) (Rehnquist dissenting) ("Unless the regulation directly conflicts with a federal statute or treaty, . . . allocates access in a manner that

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Balkinization, the environmental community proclaims as the genius of federalism. The genius of federalism within the environmental context allows the states to be laboratories of experimentation in which various policies are debated, implemented and then refined. Innovative and better ways of protecting the public health, safety and environment will be the result of allowing states to enact their own oil spill prevention regulations.

> Within our federal system, states are intended to be laboratories of experimentation in which various policies are debated, implemented and refined. The modern environmental movement started in the states. The federal government has followed the lead of the states, evaluating different state programs and borrowing the best ideas in order to form a comprehensive federal law. It is incongruous that in adopting the ideas that states have already developed, federal law should prevent further innovation by prohibiting states from expanding their environmental programs, be they regulation of hazardous materials transportation or other initiatives. By preempting state authority in this case, we effectively eliminate the ability of states to develop new and

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violates the Fourteenth Amendment, . . . or represents a naked attempt to discriminate against out-of-state enterprises in favor of in-state businesses unrelated to any purpose of conservation, . . . the State's special interest in preserving its wildlife should prevail. And this is true no matter how 'Balkanized' the resulting pattern of commercial activity") (Citations omitted); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 288 (1977) (Rehnquist dissenting) ("Barring constitutional infirmities, only a direct conflict with the operation of federal law — such as exists here — will bar the state regulatory action. . . . This is true no matter how 'peripatetic' the objects of the regulation or however 'Balkanized' the resulting pattern of commercial activity").

> better ways of protecting the public health, safety and environment. And, we prevent innovative state programs from percolating up to the federal level.

The Chlorine Institute, Inc. v. California Highway Patrol, 29 F.3d 495, 499 (9th Cir. 1994). *See also FERC v. Mississippi*, 516 U.S. 742, 789 (1982) (O'Connor concurring and dissenting) ("Even in the field of environmental protection, an area subject to heavy federal regulation, the States have supplemented national standards with innovative and far-reaching statutes").[14]

14. The BAP regulations apply to both the "primary" (on board/substantive), and "secondary" (off the ship/procedural) conduct of tanker operations in state waters. Contrary to Petitioners' assertions, state authority over vessels is not limited to secondary conduct. Intertanko Brief at 37-39.

> The characterization of a state rule as substantive or procedural will be a sound surrogate for the conclusion that would follow from a more discursive preemption analysis. The distinction between substance and procedure will, however, sometimes be obscure. As to those close cases, how a given rule is characterized for purposes of determining whether federal maritime law preempts state law will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce.

American Dredging Co. v. Miller, 510 U.S. 443, 457-58 (1994) (Souter, concurring). In the environmental context, states have historically been authorized to reasonably regulate in the realm of primary conduct. In *Huron Portland Cement Co., supra* the Court upheld state regulations designed to protect the environment while simultaneously affecting primary conduct. *Huron* authorized state regulations of vessel boiler operations in order to prevent air pollution. *See Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d. 623, 629 (1st Cir. 1994) ("State regulation of [ships or sailors] is not automatically forbidden"); *Chevron v. Hammond*, 726 F.2d 483, 629 (9th Cir. 1984) *cert. denied* 471 U.S. 1140 (1985) (upheld an Alaska prohibition of tanker deballasting in state waters — an operational procedure designed to ensure proper submergence and vessel

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C. Federal case law supports the right of states to enact regulations for the protection of the marine environment so long as those regulations do not conflict with federal law.

In *Askew v American Waterways Operators, Inc.*, 411 U.S. 325 (1973) the Court considered an action to enjoin application of the Florida Oil Spill Prevention and Pollution Control Act. *Id.* at 327. Shipping interests sought to have the Florida Act preempted by federal maritime interests and the Water Quality Improvement Act of 1970. The act subjected shipowners and terminal facilities to liability without fault up to $14,000,000 and $8,000,000, for cleanup costs incurred by the Federal Government as a result of oil spills. It also authorizes the President to promulgate regulations requiring ships and terminal facilities to maintain equipment for the prevention of oil spills. *Id.* The language of the Water Quality Improvement Act (WQIA) is similar to OPA. Section 1161(o) of the Water Quality Improvement Act provides that:

> (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or

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stability); Wyatt, M., *Navigating the limits of State Spill Regulations: How Far Can They Go?*, 8 U.S.F. Maritime L.J. 1 (1995). OPA § 1018 affirms the Congressional intent that individual states may reasonably act in the regulation of foreign oil transport to protect unique, local environmental interests, even where the regulations incidentally address on-board activities.

Petitioners argue that the *Huron* Court spared the state regulation through a finding that it had a distinct purpose from the federal statute in question: "vessel . . . safety for the federal statute and air quality and cleanliness concerns for the municipality." Intertanko Brief at 41. This distinction is of no avail in the case at bar. As noted with specificity *infra*, OPA consolidates safety and environmental protection standards.

> privately owned property resulting from a discharge of any oil or from the removal of any such oil.
>
> (2) *Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.*
>
> (3) Nothing in this section shall be construed . . . to affect any State or local law not in conflict with this section.

(emphasis added). The Court in *Askew* recognized that the federal statute "contains a pervasive system of federal control over discharges of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone." *Id.* at 330. Although the Solicitor General argued that portions of the Florida Act were contrary to the federal statute, the Court ruled that those portions of the State act concerning the application of liability to vessels had not yet been interpreted by the Florida Courts, and were susceptible to an interpretation which would harmonize the state and federal statutes. *Id.* at 331. As with OPA, the WQIA contemplated cooperative action between the states and the federal government; "that federal agencies 'shall' act 'in coordination with State and local agencies.' " *Id.* at 332. As with OPA, the reason for the WQIA savings clause was "that the scheme of the Act is one which allows — though it does not require — cooperation of the federal regime with a state regime." *Id.*

In *Askew* the Court declined to rule that Florida regulations requiring "containment gear" would be per se invalid merely because the subject to be regulated may require uniform federal regulation. The Court ruled that resolution of this question, as well as the question whether such regulations will conflict with Coast Guard regulations, should await a concrete dispute under applicable Florida regulations. *Id.* at 337.

Notably, in the case at bar there is no actual dispute alleged involving any tank vessel and any state regulation. There exists no evidence on this record that any vessel entering the internal waters of Washington was prevented from doing so or was subject to enforcement because of the impossibility of complying with state and federal regulations. This court should not entertain hypothetical claims involving preemption. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute"); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 131 (1978) ("This sort of hypothetical conflict is not sufficient to warrant preemption").

The Court in *Askew* also considered "whether a State constitutionally may exercise its police power respecting maritime activities concurrently with the Federal Government." *Id.* This question was answered affirmatively. "Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law." *Id.* at 341.

In *Ray v. Atlantic Richfield Company*, 435 U.S. 151 (1978) the Court considered a challenge to the Washington Tanker Law, which regulated the "design, size, and movement of oil tankers in Puget Sound. . . ." *Id.* at 155. Allegedly, the Washington law was preempted by the PWSA/PTSA.

The Court in *Ray* began its analysis with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 157. As articulated above, Congress has not expressed a clear and manifest purpose to supersede Washington's historic police powers to enact environmental regulations to prevent an oil spill. Section 1018 of OPA is an expression explicitly to the contrary.

A plurality of the Court in *Ray* ruled that Congress intended to foreclose state regulation of tanker design and construction. *Id.* at 164. This ruling, however, was limited to design and construction.

> This statutory pattern shows that Congress, insofar as design characteristics are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States. This indicates to us that Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements.

Id. at 163. The Court, however, recognized the State's right to enact "reasonable, nondiscriminatory conservation and environmental protection measures. . . ." *Id.* at 164. "Of course, that a tanker is certified under federal law as a safe vessel insofar as its *design and construction* characteristics are concerned does not mean that it is free to ignore otherwise valid state or federal rules or regulations that do not constitute *design or construction* specifications." *Id.* at 168-69 (emphasis added).

Washington's BAP regulations are not concerned with design and construction, and are simply "reasonable, nondiscriminatory conservation and environmental protection measures." It is undisputed that compliance with both federal and state regulations is not a physical impossibility. In addition, the BAP regulations do not stand as an obstacle to the full purposes and objectives of Congress; to the contrary they promote the objectives of Congress.

In *Chevron v. Hammond*, 726 F.2d 483 (9th Cir. 1984), *cert. denied*, 471 U.S. 1140 (1985), the Court addressed whether Alaska's environmental regulations prohibiting the operational discharge of oil in Alaska's water were preempted by Coast Guard regulations. The Court further considered an interpretation of the CWA, an environmental statute and a predecessor to OPA. The Court in *Chevron* ruled on many of the issues now presented.

Specifically, the Court reviewed a broad spectrum of federal statutes, including the PWSA/PTSA. Because the Ninth Circuit specifically found that *Ray* was limited to design and construction, it ruled that *Ray* was not dispositive to the outcome. *Id.* at 487-488. In considering the issue of implied field preemption, the Court acknowledged that although the PWSA/PTSA is silent on the subject of preemption, "numerous other federal statutes provide convincing evidence of Congress' intent that, within three miles of shore, the protection of the marine environment should be a collaborative federal/state effort rather than an exclusively federal one." *Id.* at 489. In particular, the Court considered that the Clean Water Act, which was designed to regulate the discharge of any pollutant into the nation's navigable waters, provided for a federal-state partnership for the control of water pollution. *Id.* at 489.

The Court further recognized "a well-settled congressional policy to promote a state's more stringent regulation of the local marine environment." *Id.* at 491. After reviewing the comprehensive legislative scheme, the Court concluded "that Congress has indicated emphatically that there is no compelling need for uniformity in the regulation of pollutant discharges — and that there is a positive value in encouraging the development of local pollution control standards stricter than the federal minimums." *Id.* The argument that the comprehensiveness of the legislative scheme evinces an intent to preempt was rejected. "The complexity and comprehensiveness of federal marine environmental regulation are particularly appropriate without regard to the question of preemption because these regulations must 'be sufficiently comprehensive to authorize and govern programs in States which had no . . . requirements of their own as well as cooperatively in States with such requirements.' " *Id.* at 492.

The reasoning of the Ninth Circuit in *Chevron* is directly applicable here. OPA, which is modeled after the CWA, is the most recent statement of Congressional intent enacted

immediately after the worst oil spill in American history. OPA authorizes comprehensive federal regulation in recognition of the fact that many jurisdictions will not enact relevant regulation. Like the CWA, however, it recognizes that local regulation with involvement by local officials is the best way to protect the local environment. Federal enactments create only minimum requirements.

The Court in *Chevron* also considered the effect of the local statute on international affairs, and distinguished those valid concerns with tanker design from those relevant to environmental issues.

> Although national uniformity and international consensus are critical concerns in the establishment of tanker design standards, those concerns are not essential in the regulation of pollutant discharges into coastal waters. Once a ship is constructed, it cannot meet new or different design requirements in various ports. A ship's discharge of pollutants can, however, be varied according to environmental standards and conditions in different jurisdictions. Hypothetically, state regulation regarding the discharge of pollutants could possibly interfere with the establishment of nationally uniform design requirements. But, for the most part local environmental regulations can co-exist — as they do here — with federal regulations without impinging on the exclusively federal concerns of vessel design and traffic safety.

Id. at 493. The overall nature of the environmental regulatory scheme has not changed. Federal and state environmental regulations can co-exist, as they do here. Tank vessels entering the internal waters of Washington State can comply with the state BAP regulations, Coast Guard regulations and the provisions of international treaties. Prevention of oil spills and deference to traditional state police powers continues to

dominate considerations of illusory uniformity.[15] "Thus, we conclude Congress intended that stricter state standards for oil pollution within three miles of shore be enforced in addition to Coast Guard regulations issued under the PWSA/PTSA." *Id.* at 495.

In *Berman Enterprises v. Jorling*, 793 F. Supp. 408 (E.D.N.Y. 1992) the Plaintiffs claimed that the New York Environmental Conservation Law was preempted by operation of the PSWA as amended and subject to Coast Guard regulation. *Id.* at 414. The Plaintiffs in *Berman* also relied upon *Ray* to support their contention of conflict and field preemption. *Id.* The *Berman* Court rejected Plaintiffs' claim of preemption and their reliance on *Ray*. "Contrary to plaintiffs' view, *Ray* indicates how far the Supreme Court is willing to go to allow local regulation of oil tanker activity." *Id.* at 415 (Citing L. Tribe, *American Constitutional Law*, § 6-28, at 487 (2d ed. 1988). In response to Plaintiffs' claim of conflict preemption, the Court in *Berman* again relied upon *Ray* and ruled that only an *actual conflict* between state and federal law could result in preemption.

> *Ray*, however, only invalidated state provisions where there was an actual conflict between state and federal law. Where there was no such conflict, the Court steadfastly refused to infer preemption in the field of environmental protection, an area that lies at the core of the states' police powers.

Id. at 415-416. In the case at bar, there is no actual conflict.

The Court in *Berman* explicitly recognized that states are authorized to exercise their historic police powers not only after

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15. The Court in *Chevron* recognized that the PWSA/PTSA does not mandate strict international uniformity and that the statute gives the Coast Guard specific authority to establish stricter standards than those set by international agreements, 46 U.S.C. § 391a(6). "This indicates Congress' view that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction." *Chevron* at 493-494.

the oil hits the water, but to *prevent* oil spills in the first instance. "*Ray* specifically allowed for statutes that are designed to protect the environment against imminent (or even non-imminent) harms." *Id.* at 417. A more eloquent statement of the necessity for local regulation is hard to imagine.

> Plaintiffs in effect are asking the federal courts to tell New York that it may not, in the exercise of its police powers, plan against the desecration of its waters and coast that would otherwise surely result from the high volume of oil barge traffic on the state's waterways. Plaintiffs would instead have the state rely entirely on distant and overextended officials in Washington, D.C. for basic environmental protections. Such an ineffective scheme is not contemplated by the federal Constitution.

Id. at 416-417.

The Court in *Berman* explicitly considered the effect of the non preemption provisions of both the CWA and OPA and acknowledges that if there were otherwise any doubt about preemption, these acts "settle the issue." *Id.* at 416. After quoting both acts, the Court concluded that "[f]ar from being preempted, [New York] accepts the federal government's invitation to provide additional means of enforcing the federal policy favoring clean water." *Id.*[16] *See also Ballard Shipping Co., v. Beach Shellfish*, 32 F.2d 623 (1st Cir. 1994) (upholding state law despite the existence of a direct conflict between state law and maritime law).[17]

16. Addressing the issue of interstate commerce, the Court in *Berman* ruled that there was no evidence that the state's regulation created an unreasonable burden or that the burden exceeded the cost of policing and protecting against adverse consequences of oil transportation on New York's waterways. "The *Ray* Court indicated that commerce clause challenges to environmental protection statutes should not be entertained lightly." *Id.* at 417.

17. In *Ballard Shipping*, the Court addressed the state interests as follows:

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In the case at bar, there is no actual conflict between the federal regulatory scheme and Washington's BAP regulations; the State's regulations do not render compliance with federal law burdensome or impossible and do not inhibit conduct that federal law specifically encourages. There is no evidence in the record that compliance with the BAP regulations is anything more than *de minimus* in relation to the overall costs of oil tanker operation. *See* Affidavit of Arthur McKenzie, JA-330. Moreover, the protection afforded by the BAP regulations is unmistakable. *See* Affidavit of Stanley Norman, JA-253.

1. The BAP regulations do not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

After the *Exxon Valdez* disaster, Congress recognized that only a broader joint partnership between the federal government and the states could prevent future oil tragedies. In the true spirit of federalism, Congress enacted OPA with the intent of consolidating and enhancing prior Congressional measures expected to prevent oil spills.

OPA's fundamental purpose and objective is oil spill prevention. This is accomplished through a comprehensive integration of liability, compensation and vessel standards.

> In the field of tanker regulation, the overarching purposes of Congress are best revealed by OPA 90. As the most recent federal statute in the field,

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> No one can doubt that the state's interest in *avoiding pollution* in its navigable waters and on its shores, and in redressing injury to its citizens from such pollution, is a weighty one. In *Huron Portland Cement*, the Supreme Court described state air pollution laws as a classic example of police power, and continued: "In the exercise of that power, the states . . . may act, in many areas of interstate commerce and **maritime activities**, concurrently with the federal government." 342 U.S. at 442.

Id. (italicized emphasis added, bold emphasis original).

> OPA 90 reflects "the *full* purposes and objectives of Congress," better than the PWSA, the PTSA, or the Tank Vessel Act, all of which OPA 90 was designed to complement.

148 F.3d at 1043 (internal citation omitted; emphasis in original). OPA serves to remove the patchwork of oil spill prevention measures by placing them into a comprehensive, environmentally oriented statute.[18] Prior to OPA, oil spill liability provisions were codified separately from vessel safety standards. OPA exhibits a marked change in the law through the compilation of particular vessel standards into an environmental context. OPA's evolution exhibits Congress' continuing efforts to strengthen laws designed to prevent oil spills, and is a direct recognition that the pre-*Exxon Valdez* status quo of liability and safety provisions were unacceptable. Section 1018 now presents a single comprehensive savings clause which includes authorization of "additional [state] . . . requirements . . . *relating to* the discharge, or *substantial threat of a discharge, of oil*." Such a threat is certainly presented by an oil tanker which is poorly operated in state waters.

2. The BAP regulations do not conflict with federal statutes, treaties or international law.

It is virtually undisputed that compliance with the State, federal and international standards is not a physical impossibility. *See* JA-87. In addition, the federal regulations do not afford protection for unique local conditions.

Petitioners allege that the lower court did not apply a comparative analysis of the BAP regulations with their federal

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18. "What the Nation needs is a package of complementary international, national, and State laws that will adequately compensate victims of oil spills. . . . Instead, there is [currently] a fragmented collection of Federal and State laws providing inadequate cleanup and damage remedies . . ." OPA 90, Sen. Rept. No. 101-94, 2, July 28, 1989.

international counterparts. U.S. Brief at 16. Petitioners are mistaken. Both Petitioners and Respondents exhaustively briefed comparisons of the State rules with international standards. *See e.g.*, Intervenor Dist. Ct. Sum. J. Res., 26-40; U.S. 9th Cir. Rep. Br. 8-16; Intervenor 9th Cir. Res. Br. 45-52. The District Court entailed a specific analysis of federal, international and State provisions. 947 F. Supp. at 1496-97. Ultimately, as discussed, *infra*, Petitioners' assertions of international law conflicts were denied because the international treaty provisions at bar are non-self-executing and set only minimum standards. *Id.*, at 1490, n.3; 148 F.3d at 1063.

D. The Strait of Juan de Fuca is the internal waters of the State of Washington — the State has greater sovereign interest and authority over internal waters.[19]

To delimitate internal waters, the Court has adopted the rules of the 1958 Convention on the Territorial Sea and the Contiguous Zone. *See United States v. California*, 381 U.S. 139, 165 (1965); Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1606; *United States v. Alaska*, __ U.S. __, __, 117 S. Ct. 1888, 1893 (1997). Three requirements must be met to satisfy the "historic-waters" classification; "the United States: (1) exercises authority over the area; (2) has done so continuously; and (3) has done so with the acquiescence of foreign nations." *Alaska*, S. Ct. at 1895. All three requirements are met within the Strait of Juan de Fuca.[20]

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19. In the appellate court, the Government argued for the first time that the BAP regulations interfere with the right of innocent passage. The Government is wrong. But this issue was never raised in the District Court. It should not be considered for the first time on appeal. The Ninth Circuit was correct is its decision not to consider this issue. 148 F.3d 1063-64. The government was explicitly invited by Intertanko to intervene in the District Court, but declined the invitation. Supp. Excerpts at 718.

20. The Strait of Juan de Fuca is a geographic cul-de-sac. Both U.S. and Canadian waters where tanker ports are located are

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The BAP regulations only extend to tankers which physically enter the internal, or "historic," waters of Washington State, including the Strait of Juan de Fuca. In 1993, the Coast Guard explicitly acknowledged that "U.S. waters in the Strait of Juan de Fuca are *internal waters* of the United States." 58 FR 27629 (1993) (emphasis added). The Coast Guard finding is consistent with a 1984 Canadian Supreme Court decision that all waters on the Canadian side of the Strait are comprised of the internal waters of both the Canadian government and British Columbia. *See Re: Ownership of the Bed of the Strait of Georgia*, 1 S.C.R. 388, 389 (1984). As internal waters, Washington State owns all the submerged lands under the Strait. *United States v Louisiana*, 470 U.S. 89, 94 (1985). Washington State's jurisdiction over, and proprietary rights in, the Strait of Juan de Fuca, to the Canadian boundary, underscores its interest in preventing oil spills within these waters.[21]

1. The presumption against preemption is stronger within internal waters.

Within internal waters, a state retains a right of sovereignty to regulate surface traffic concurrently with the United States. *Alaska*, *supra* at 1892 ("Ownership of submerged lands — which carries with it the power to control navigation, fishing,

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unquestionably within sovereign internal waters. The Court has commented that under U.S. policy, this geographical reality may itself be determinative on the classification of Strait waters as internal. *United States v. Alaska*, 521 U.S. 1, 18 (1997) ("the character of the strait depends on the character of the waters to which it leads").

21. The status of the Strait as internal waters has great relevance to the extent of Washington's police powers. One of the foundations of the Government's argument is that international concerns are greater with respect to the right of foreign tankers entering the Strait of Juan de Fuca. Correspondingly, the State's right to exercise it police powers must be at the highest within internal waters, waters which belong to the State as a matter of constitutional principle independent of any Congressional grant. *See Pollard's Lessee v. Hagan*, 3 How. 212 (1845).

and other public uses of water — is an essential attribute of sovereignty"). While the State concedes that it does not have the authority to prohibit entry of tankers into the Strait (State Br. in Opp. 3, fn.4), it retains an even stronger right to exercise its police powers within its internal waters as compared to territorial waters. As the BAP regulations relate to internal waters, overcoming the presumption against preemption is more difficult.

E. There exits a strong presumption against preemption. The historic police powers are not to be superseded absent a clear expression of Congressional purpose.

All parties recognize that there exists a strong presumption against preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). In evaluating a federal law's preemptive effect, courts proceed from the presumption that the historic police powers of the state are not to be superseded by a federal act "*unless that [is] the clear and manifest purpose of Congress.*" *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added).[22] Quite simply, Congress has not clearly manifested its purpose to preempt efforts by the states to prevent oil spills. Just to the contrary, OPA Section 1018 specifically authorizes the states to regulate to prevent oil spills.

22. An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred, and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. . . . Furthermore, we should be slow to strike down legislation which the state concededly had power to enact because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.

Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 275 (1943).

F. The Oil Pollution Act of 1990 authorizes the states to enact complementary regulations to prevent oil spills or the substantial threat of an oil spill.

1. The clear language of Section 1018.

Contrary to expressing its "clear and manifest" purpose to supersede the state's historic police powers, the clear language of OPA provides for a savings clause or express non-preemption. The relevant statutory language appears as follows:

> (a) Nothing in this Act or the Act of March 3, 1851, shall . . .
>
> (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from *imposing any additional liability or requirements* with respect to . . . (A) *the discharge* of oil or other pollution by oil within such State; or (B) any removal activities in connection with such discharge; . . .
>
> (c) *Nothing in this Act*, the Act of March 3, 1851, or section 9509 of the Internal Revenue Code of 1986 *. . . shall in any way affect, or be construed to affect, the authority* of the United States or *any State* or political subdivision thereof
>
> (1) *to impose* additional liability or *additional requirements*: or
>
> (2) to impose or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;
>
> relating to the discharge, *or substantial threat of discharge, of oil.*

OPA § 1018 (emphasis added). This clear statutory language obviates the necessity of consideration of the congressional history. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter for the court . . . must give effect to the unambiguously expressed intent of Congress").

Until now, Petitioners have conceded that Section 1018(a) of OPA granted to the states additional authority to enact regulations relevant to the issue of liability for an oil spill. 148 F.3d at 1059 ("Intertanko asserts, § 1018 is limited in its application to state laws concerning liability and penalties . . . ."). They have offered no explanation at all concerning the meaning or purpose of Section 1018(c). Petitioners have now apparently abandoned their earlier interpretations. Intertanko and the Government are not the only ones who have dramatically changed their proffered interpretation of Section 1018. Even the Coast Guard has previously conceded that Section 1018 authorized the states to legislate in this area without fear of preemption.[23]

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23. In a memorandum dated August 18, 1992 the Coast Guard Commandant, J.W. Kime, states:

> The Oil Pollution Act of 1990 (OPA 90) has been with us for over two years now. The act materially altered the nature of the relationship between the Coast Guard and the states in the marine environmental protection (MEP) arena. *States now have the opportunity for a more active role in pollution prevention, response, access to the Oil Spill liability Trust Fund (the fund), and freedom to regulate in areas historically reserved to federal agencies.*

JA-301 (emphasis added). In a memorandum dated May 19, 1993 from A. E. Henn, Chief, Office of Marine Safety, Security and Environmental Protection, the Coast Guard acknowledged:

> The Oil Pollution Act of 1990 (OPA 90) specifically affirmed the rights of states to protect their marine environment.
>
> . . .
>
> Several states have been extremely pro-active in developing programs that may differ somewhat from our Coast Guard policies and may exceed our mandates and regulations. *OPA 90 did not preempt states rights*, and, in our efforts we must be committed to work together to complement rather than duplicate. Should Federal preemption of a state mandate become necessary, it will become a complex legal issue.

JA-292-293.

Petitioners' previous arguments made little sense.[24] Petitioners now argue that Section 1018 only preserves the status quo; that this section preserves for the states whatever rights they may have had to enact oil spill regulations before the passage of OPA, but that those rights are not expanded by OPA. U.S. Brief, at 44.[25] This interpretation is inconsistent with the plain language of the statute and this Court's interpretations of a virtually identical savings clause in the Water Quality Improvement Act. *See Askew* v. *American Waterways Operators, Inc., supra.*

By the use of the words "additional requirements," Congress can only have meant additional to those requirements already established by OPA. The State of Washington has accepted Congress' invitation to impose additional requirements.[26]

24. If § 1018(a) grants to the states ample authority to impose their own standards of liability which differ from federal or international standards, then no additional statutory language is necessary to achieve this result. Subsection (c) expanded the permissible scope of state action from that already provided in subsection (a), otherwise it would be merely superfluous. The only real difference between subsection (a) and subsection (c) is that the latter allows the states to impose both "additional liability *or additional requirements*" for a *"substantial threat of a discharge, of oil"*, and not just for oil discharges or removal activities. It is clear that the terms "additional liability" and "additional requirements" have a different meaning, otherwise it would be a mere redundancy.

25. Petitioners' arguments that OPA § 1018 is limited to Title I of the Act (Intertanko Brief at 46-47) are in discord with the language of the provision. § 1018(a)(B) preserves the authority of the states to impose "additional . . . requirements with respect to . . . any *removal* activities . . ." *Id.* (emphasis added). Federal removal activities are placed within Title IV of the Act, along with prevention standards. This fact did not escape the District Court's attention; "Thus, the savings clause cannot be limited to Title I, but must also include Title IV." 947 F. Supp. at 1492.

26. Petitioners contend that a "substantial threat of a discharge" is limited to "incident[s] involving a vessel that may create a (Cont'd)

Petitioners dismiss the unique language and purpose of OPA § 1018(c). The provision is not found in any prior oil pollution liability statute. Prior to the passage of OPA, environmental statutes designed to prevent oil pollution [WQIA § 11(o)(2), CWA § 311(o)(2)] contained savings clauses which were virtually indistinguishable from OPA § 1018(a). However, in the construction of the OPA savings clause, Congress conspicuously changed the structure of the prior provisions and added subsection (c). Had Congress merely intended OPA § 1018 to be limited to liability and compensation, subpart (c) would not have been necessary. While OPA does not expand state police powers per se, the broader savings clause of OPA allows the states to utilize their police powers to impose a broader range of environmental restrictions than previously enacted statutes. *See* Congressional letter JA-327.

2. OPA is an environmental statute.

Petitioners attempt to dress the BAP regulations in admiralty clothing to expand the reach of federal authority, yet Petitioners cannot escape the fundamental underpinning of OPA: environmental protection. OPA is not a federal maritime statute in the character of PWSA/PTSA, but is instead an integration of prior liability and safety regimes, in particular CWA § 311: "[t]he body of law already established under section 311 of the Clean Water Act is the *foundation* of [OPA]." Senate Report

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significant risk of discharge of cargo oil. Such incidents include, *but are not limited to* groundings, stranding, collisions, hull damage, fire explosion, loss of propulsion, flooding, on-deck spills, or other similar occurrences." Intertanko at 44, n.30, *quoting* 33 C.F.R. § 155.1020 (emphasis added). Even assuming the applicability of this Coast Guard definition, the language of OPA § 1018(c) authorizes regulations "relating to" these risks; prevention of these incidents in State waters are precisely the purpose of the BAP regulations. Undermining Petitioners' contention that states only have the power to regulate for liability and compensation (i.e., after oil hits the water) is the inclusion of "significant risk." in the Coast Guard definition. Where a significant risk exists, oil is obviously still confined to the tanker.

No, 101-94, 4, July 28, 1989 (emphasis added).[27] OPA presents a comprehensive regime for oil spill prevention and stands alone in providing an authoritative federal-state partnership designed to prevent oil spills by embracing *both* liability and safety.[28]

27. Petitioners' assertion that environmental protection of the marine environment has historically been within the exclusive domain of the federal government is factually wrong. *E.g. The Chlorine Institute, Inc. v. California Highway Patrol*, 29 F.3d 495, 499 (9th Cir. 1994) ("The modern environmental movement started with the states"). The emergence of domestic tanker safety standards enacted specifically to prevent oil pollution did not occur until codification of the 1972 Ports and Waterways Safety Act (PWSA), 33 U.S.C. § 1221 *et seq.* Environmental oil spill liability regimes did not appear until passage of the 1970 WQIA.

> Prior to 1972, existing [U.S.] legislation dealt primarily with regulations governing the physical security of vessels, ports and waterfront facilities. For example, the Tank Vessel Act of 1936 was enacted to prevent damage to life and property from the carriage of flammable or combustible liquid cargos in bulk, but did not specifically address the protection of the environmental quality of US ports and navigable waters. In 1950 Congress passed the Magnuson Act which authorized the promulgation of rules governing the protection of vessels, harbours, ports and waterfront facilities in the United States in cases where national security was endangered. Neither of these laws, however, was considered sufficiently broad to encompass protection of the marine environment.

De La Rue, *supra* at 773.

28. The primary object and purpose of the PWSA/PTSA and Title 46 is to ensure safe construction design and navigational standards, fundamentally maritime issues. Nowhere within these acts is there any provision for liability in the event of an oil spill. This conspicuous absence confirms that these acts are maritime statutes, not environmental statutes. Under Title 46, "prohibited acts" *only* cover noncompliance with construction and design characteristics. 46 U.S.C. § 3713. Similarly, no treaties before the Court provide for spill liability. MARPOL 73/78 does provide for enforcement of

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Congress provides that the national policy to prevent water pollution rests primarily with the states; "[i]t is the policy of Congress to recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution." CWA 101(b) (emphasis added). *See also* Clean Air Act, 42 U.S.C. § 7407(a)(3) ("the prevention and control of air pollution at its source is the *primary responsibility of states* and local governments") (emphasis added). Thus, there is not a uniquely federal interest in protecting the quality of the nation's water. Rather, the primary responsibility for preventing oil pollution rests on the states. Although there is arguably a federal interest in preventing oil pollution in state waters, this interest does not apply to the exclusion of state law.

Petitioners consistently refuse to acknowledge the difference between maritime regulation and environmental regulation. This difference, however, did not escape the Court in *Ray*, 435 U.S. at 164. ("We do not question in the slightest the prior cases holding that enrolled [those engaged in domestic or coastwise trade] and registered [those engaged in foreign trade] vessels must conform to 'reasonable, nondiscriminatory conservation and environmental protection measures' . . . imposed by a State."). The BAP regulations conform precisely to the above description: the BAP regulations are "reasonable, nondiscriminatory conservation and environmental protection measures."

3. Notwithstanding the clear language of Section 1018, Congressional history supports Intervenors' interpretation of the savings clause.

As the language of the Congressional record makes clear, Section 1018 of OPA was modeled after the savings clauses of the Water Quality Improvement Act and the Clean Water Act.

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intentional discharge violations, but does not specify a remedy. MARPOL 73/78, Art. 6. Actual prohibition of oil pollution is prescribed under distinguishable federal environmental statutes in coordination with state law, particularly OPA and the CWA.

Congress intended states to have the ability to protect their environment *before* oil hits the water.

> To date, Federal legislation has affirmed the rights of States to protect their own air, water, and land resources by permitting them to establish State standards which are more restrictive than federal standards.
>
> . . .
>
> [T]he Federal statute is designed to provide *basic protection* for the environment and victims damaged by spills of oil. Any State wishing to impose a greater degree of protection for its resources and citizens is entitled to do so.

S. Report No. 101-94, at 6 (emphasis added).

> The long-standing policy in environmental laws of not preempting State authority and recognizing the rights of the States to determine for themselves the best way to protect their citizens, is clearly affirmed in S. 686 [i.e., § 1018].
>
> . . .
>
> This subsection [(1018(c))] reinforces the position stated clearly elsewhere that *no aspect* of State oil spill programs is preempted, *including* the authority to impose additional requirements or penalties.

Id., 17-18 (emphasis added).

Petitioners simply pay undue reliance upon the House Conference Report statement that OPA "does not disturb the Supreme Court's decision in *Ray v.* [*ARCO*]." H.R. Conf. Rep. No. 653, 101st Cong., 2nd Sess. At 122 (1990), reprinted in 1990 U.S.C.C.A.N. 800. Legislative history confirms that the purpose of this qualification was to ensure that the states would not act in the areas of design and construction.[29]

29. A Commerce, Science and Transportation Committee Report addressing the proposed legislation placed the pre-OPA (Cont'd)

G. The express preemption asserted by the U.S. Coast Guard has exceeded the scope of its administrative authority.

The U.S. Coast Guard has no greater authority to preempt state regulation than granted under the terms of the statute itself.

> [A] federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.
>
> . . . .
>
> *An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.* This we are both unwilling and unable to do.

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savings clause, then known as Section 112, within Title I, which also included tanker vessel standards. *See* Senate Report 101-99, Aug. 1, 1989. The Committee specifically commented on the objective of Section 112: "This section declares that nothing in this legislation shall be construed or interpreted to affect in any way the authority of a State or political subdivision to *regulate oil tankers or to provide for liability or response planning* and activities in State waters." *Id.* at 21 (emphasis added). The later acknowledgment of *Ray* in the House Conference Report did not invalidate this assertion, but merely qualified that it did not apply to the design and construction of tankers.

Louisiana Pub. Serv. Conn'n v. FCC, 476 U.S. 355, 374 (1986) (emphasis added).[30] Although deference to administrative agencies in some cases is appropriate, federal courts should not allow deference to "slip into a judicial inertia" and "rubber stamp" administrative determinations. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983). This deference is especially inappropriate where agency action "is premised on its understanding of a specific Congressional intent . . . [which is] the quintessential judicial function of deciding what a statute means." *Id.* 464 U.S. at 97-98 n.8. *See also Trustees of California State University v. Riley*, 74 F.3d 960, 963 (9th Cir. 1996) ("In reviewing an agency's construction of a statute, the court must reject those constructions that are contrary to clear Congressional intent or frustrate the policy that Congress sought to implement").

In the case at bar, Congress has spoken to the precise issue in question. The statute and the legislative history make clear that Congress intended to allow the states to implement protective regulations to prevent oil spills within their jurisdiction. The Coast Guard's determination to the contrary "is premised on its understanding of a specific Congressional intent," and therefore is entitled to little deference. The Coast Guard "may not confer power upon itself." *Louisiana Pub. Serv. Conn'n v. FCC, supra*. The Coast Guard's determination of the preemptive effect of its regulations is simply beyond its authority and has no effect. This was precisely the ruling

30. *See also Jenkins v. I.N.S.*, 108 F.3d 195, 200 (9th Cir. 1997) ("[A]n agency interpretation is not entitled to deference if it is contrary to clearly expressed congressional intent. . . . Statements in a Committee Report are not law, and it subverts our constitutional structure to treat them as such when the statutory language is facially unambiguous."); *State of Alaska v. Babbitt*, 54 F.3d 549, 552 (9th Cir. 1995) (we consider "whether Congress 'has directly spoken to the precise question at issue' *either in the statute itself or in the legislative history.*") (Emphasis added).

of the District Court, 947 F. Supp. 1496, and the Ninth Circuit. 148 F.3d at 1068.[31]

H. The treaties cited by Petitioners are not preemptive because they are not self-executing.

Petitioners contend that as the "supreme Law of the Land," international treaties independently preempt the BAP regulations under the Constitution, Art. VI, Cl. 2. Intertanko Brief at 29, U.S. Brief at 28. A more sweeping generalization on treaty interpretation is hard to imagine. Respondents agree that by virtue of a treaty's ratification, it is the "supreme Law of the Land." This elementary conclusion, however, is of no import on the question of state law preemption by treaty provisions. Such provisions are subject to the same substantive limitations as any other legislation. *Reid v. Covert*, 354 U.S. 1, 16-19 (1965).[32]

31. Where a federal agency asserts differing policies on the issue of preemption, any deference to which they might otherwise be entitled evaporates. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 fn.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency held view."); *Seldovia Native Ass'n, Inc., v. Jujan*, 904 F.2d 1335, 1345 (9th Cir. 1990) ("When an agency reverses a prior policy or statutory interpretation, its most recent expression is accorded less deference than is ordinarily extended to agency determinations."); *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457 (9th Cir. 1992) ("Given this fluctuation [of the agency's position] over the course of two years, we decline to rely on the Forest Service's " 'expertise.' "). The Coast Guard's pronouncement that its regulations are to have preemptive effect are inconsistent with its previous memoranda, and entitled to no deference. *See* n.20, *supra*.

32. When federal courts are presented with questions of international law preempting a state regulation, they are not bound by one set mode of interpretation. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-715 (9th Cir. 1992); *Restatement (Third) of Foreign Relations Law of the United States* (*Restatement*), § 325, comment (d) ("[d]ifferent approaches to interpretation have

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In order for a vessel standard contained in an international treaty to constitutionally preempt the BAP regulations, it must be of a self-executing character. A self-executing standard is one which has specific requirements which can be directly applied by the courts. *U.S. v. Verdugo-Urquidez*, 939 F.2d 1341, 1359, n.17 (9th Cir. 1991) ("A self-executing treaty is one which, of its own force, confers rights on individuals, without the need for any implementing legislation"). There are at least four relevant factors to be considered when determining whether a treaty is self-executing:

> (1) The purposes of the treaty and the objectives of its creators, (2) the existence of domestic procedures and institutions appropriate for direct implementation, (3) the availability and feasibility of alternative enforcement mechanisms, and (4) the immediate and long-range social consequences of self- or non-self-execution.

People of Saipan v United States Department of Interior, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975). When treaty provisions before a Court are phrased in broad generalities, they cannot be self-executing. *Frolova v Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985). *See also* 947 F. Supp. at 1490 n.3. A non-self-executing treaty does not provide definitive rules which a court may apply to reflect preemption.

> (3) Courts in the United States are bound to give effect to international law and international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary legislation.
>
> (4) An international agreement is "non-self-executing" (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation.

Restatement (Third) of Foreign Relations Law of the United States (*Restatement*), § 111 (1987).

None of the treaty provisions under consideration are self-executing. The treaties under consideration impose international vessel standards that require unilateral implementation on the domestic level by each signatory nation. All treaty provisions relied upon by Petitioners therefore necessarily require implementation by the Coast Guard.[33] It is

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developed for particular categories of agreements"). When state legislation is alleged to violate an international agreement, the federal judiciary will examine the treaty in light of the expectations the United States had when ratifying the agreement and subsequent changes in U.S. policy and the international order. *Reid v Covert*, 354 U.S. 1, 18 (1957) ("when a [federal] statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null"). OPA necessarily alters contemporary interpretation of international regimes.

Application of international law within the federal judiciary is limited to constraints imposed by the Constitution. *Guaranty Trust Co. v United States*, 304 U.S. 126, 143 (1938) ("Even the language of a treaty, wherever reasonably possible, will be construed so as not to override state laws or to impair rights arising under them"). International law cannot supersede the Tenth Amendment in and of itself, particularly with respect to state police powers designed to prevent marine pollution. *See, e.g., Askew v American Waterways, supra*; *Huron Portland Cement, supra*.

33. STCW provides that "Parties undertake to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary to give the Convention full and complete effect." STCW, Art. I(1). STCW standards set forth the least common denominator in vessel safety: "Although conceived as a minimum requirement below which no flag state should fall, *the lack of clear definition of training standards* means that STCW is often in effect the maximum level above which many states fail to rise." *Safer Ships, Cleaner Seas; Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping* (*Donaldson Report*)
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not, therefore, the treaties which are relevant to the issue of preemption, but the Coast Guard regulations.

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(emphasis added) (JA-323). STCW is implemented by the Coast Guard pursuant to 46 U.S.C. § 2101 *et seq.*

Petitioners claim that many of the BAP regulations are prohibited by 1995 STCW amendments. These amendments have no force of law in the United States. The 1995 amendments came into international force February 1, 1997. However, the Coast Guard has merely issued a notice of intent to issue an interim rule in conformity with the amendments. 62 FR 5197 (1997). After the interim rule is issued, the amendments will not be enforced by the Coast Guard for previously certified vessels until January 31, 2002. *Id.* at 5198-99.

SOLAS also sets forth the least common denominator in vessel safety. Each State is required to unilaterally implement regulations for their vessels which are *"at least as effective* as that required by the [Convention]" SOLAS Ch.1, Pt. A, Reg. 5 (emphasis added). SOLAS is implemented by the Coast Guard pursuant to 3 C.F.R. § 277.

MARPOL 73/78 indicates that "[p]arties . . . shall issue, or cause to be issued, regulations or instructions on the procedures to be followed in reporting incidents." MARPOL 73/78, Protocol I, Art. V(2). The Convention further provides that "[e]ach party to the Convention shall . . . make *all arrangements necessary* for an appropriate officer or agency to receive and process all reports on incidents." MARPOL 73/78, Art. 8(2)(a) (emphasis added). MARPOL 73/78 is implemented by the Coast Guard pursuant to 33 U.S.C. §§ 1901-1915.

COLREG sets forth minimum, non-self-executing standards for navigational safety and nations are free to implement their own regulations: "[n]othing in these Rules shall interfere with the operation of special rules made by an appropriate authority for roadsteads, harbors, rivers, lakes, or waterways connected with the high seas and navigable by seagoing vessels. Such special rules shall conform as closely as possible to these Rules" COLREG R. 1(b). The Coast Guard "is authorized to promulgate such reasonable rules and regulations as are necessary to implement the provisions of [COLREG]." 33 U.S.C. § 1607.

I. International laws designed to prevent oil spills are not uniform.

Uniform international vessel standards are non-existent, a fiction. Reciprocity and uniformity are amorphous international goals and do not exist in any recognizable order, and certainly not in practice. International vessel standards are all subjectively interpreted by each signatory nation. *Restatement*, § 325, Reporters' Note (4).

None of the international agreements raised by Petitioners set forth specific rules which are, or are required to be, uniformly complied with by the international shipping community. *See* Dec. Sally Lentz, JA-211. IMO admits that treaty standards are non-self-executing and the least common denominator for a flag-state to follow when implementing domestic standards. *Flag State Implementation*, IMO Maritime Safety Committee, MSC 66/12/1 (January 29, 1996). *See* Supp. Excerpts at 514-516 par. 8-10. Uniformity in international standards is all but nonexistent.

> Flag States have duties as well as rights. They have a duty to ensure that their ships comply with the standards accepted by the Flag States under international law and Conventions. Regrettably *Flag States are not uniform in their determination or ability to discharge this duty.*

Safer Ships, Cleaner Seas; Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping (*Donaldson Report*) (emphasis added). Supp. Excerpts, at 819 par. 2.13.

Nations that ratify international agreements to prevent oil pollution have conflicting economic incentives for implementing or enforcing domestic legislation. *See Implementation of IMO Instruments* (JA-223); *see also Non-Observance of International Rules and Standards: Competitive Advantages*, (JA-229). Many "vessels fly the flags of whatever nation seems the most likely to tolerate the lowest and cheaper standards." *Donaldson Report*, Supp. Excerpts, at 821 par. 2.25. "[S]hipping is still a largely free market which allows considerable scope for shipowners,

. . . to . . . avoid compliance with internationally agreed rules and regulations as regards safety and the protection of the marine environment." *Flag State Implementation*, JA-230 par. 2.

Many owners avoid international standards by registering their vessels in "flag of convenience" nations. These nations consist of flag states which do not exercise effective supervision or regulation of their vessels "for reasons of economy or a perverted desire to be competitive." *Donaldson Report*, JA-315 par 6.24. Many flag of convenience nations, as well as other nations, refrain from implementing any internationally conforming standards and instead delegate this authority to Classification Societies. Classification societies are incapable of implementing effective standards to prevent marine pollution; classification societies "vary greatly in their quality, capacity and dedication." *Donaldson Report*, Supp. Excerpts, at 823 par. 2.33.

1. The United States Coast Guard does not practice domestic or international uniformity or reciprocity.

Under Title 46 of the U.S. Code and the PWSA/PTSA, Coast Guard regulations to protect the marine environment require unilateral consideration of unique local conditions. 46 U.S.C. § 3703(c)(2)-(5). The Coast Guard must necessarily employ non-uniform regulations from one geographic area to another. 33 U.S.C. §§ 1223-1224. Title 46 provides that "[t]he Secretary . . . may prescribe regulations that *exceed standards set internationally.* [These r]egulations . . . are *in addition to regulations prescribed under other laws* that may apply to [tank] vessels." 46 U.S.C. § 3703(a) (emphasis added).[34]

34. The U.S. will not practice reciprocity when it is in the Nation's interest. Passage of PWSA was due in considerable respect to Congress' rejection of international construction and design standards.

> The domestic pressures behind the international efforts of the United States . . . found expression in Congress' 1972 passage of [PWSA]. It required the Coast Guard to adopt

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Arguments for international uniformity are also undercut by the Coast Guard's implementation process. The Coast Guard reserves and practices the right to enact regulations at variance with treaties to which the U.S. is a party. The Coast Guard has explicitly declared in reference to the new amendments to STCW that "[i]n some cases, *clear differences with the international scheme are retained* to preserve continuity in the U.S. licensing system." 62 FR 13285 (March 26, 1996) (emphasis added).[35]

J. The BAP regulations are not prohibited by the Foreign Affairs Clause or the foreign affairs policy of the United States.

Petitioners argue that the BAP regulations jeopardize the ability of the United States to speak with one voice on the international level and impairs U.S. credibility.[36] They fail, however, to offer legal analysis in support of the their position.

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> strict unilateral equipment standards by 1976 unless other countries agreed to rules similar to those the United States was proposing [before IMO]. The Coast Guard was also to deny entry to any ships violating such rules.

Mitchell, R., *supra* at 94.

35. The U.S. argues, in part, that Title 46 U.S.C. Chapter 37 requires the Secretary to accept foreign vessel certificates of compliance, thereby acting with reciprocity. U.S. Brief at 5. Petitioner ignores the discretionary nature of the provision. Chapter 37 "requires" that "the Secretary *may* issue [a] certificate only after the vessel has been examined and found to be in compliance with this chapter . . . " 46 U.S.C. § 3711 (emphasis added). "This means that the Secretary *does not have to accept* foreign certificates of compliance." *Id.* at Historical and Revision Notes (emphasis added). Because of its discretionary nature, § 3711 is simply not reciprocal.

36. Graver concerns were expressed throughout the international community over OPA's promotion of non-uniform liability regimes, and the very real prospect of oil tankers facing state regimes which impose unlimited liability. De La Rue, *supra*, 66-68; Coney, M., *The Stormy Seas of Oil Pollution Liability: Will Protection and Indemnity Clubs Survive?*, 16 Houston J. of Int'l

(Cont'd)

A state statute with international implications is valid if it provides no discretion for state administrative officials "to comment on, [or] key their decisions to, the nature of foreign relations." *Zschernig v. Miller*, 389 U.S. 429, 434 (1968). State regulations which have only an "incidental or indirect effect in foreign countries" do not intrude on the foreign relations of the United States. *Clark v Allen*, 331 U.S. 503, 517 (1947). When police powers are exercised to prevent pollution, any impact on international law and relations is incidental, remote, and constitutional. *Silz v Hesterberg*, 211 U.S. 31, 40-41 (1908). In order for a state regulation to frustrate U.S. foreign policy, its application must have more than an "incidental or indirect" effect on the foreign affairs of this country. *Zschernig*, at 434. *See also Clark*, at 516-17; *Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903, 913 (3rd Cir. 1990), *citing Zschernig* ("[o]n only one occasion has the Supreme Court struck down a statute as violative of the foreign relations power"). *In Re Alien Children Ed. Litigation*, 501 F. Supp. 544, 595 (S.D. Texas 1980) ("The constitutional delegation of the authority to conduct foreign affairs . . . has not evolved to prohibit states from enacting laws which may affect an area of international concern").

The BAP regulations are applied non-discriminatorily and not based upon any particular foreign national policy. As the Ninth Circuit aptly noted, "Intertanko fail[ed] to point to any

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(Cont'd)
L. 343, 347 (1993) ("transportation of oil to the United States could be severely disrupted . . ."); Eubank, S., *Patchwork Justice: State Unlimited Liability Laws in the Wake of the Oil Pollution Act of 1990*, 18 MD. J. Int'l L. & Trade 149, 150 (1994) ("[t]he fear of unlimited liability at the state level has generated . . . threats of trade-based retaliation against the United States"); Wilkinson, C., *et al.*, *Slick Work: An Analysis of the Oil Pollution Act of 1990*, 12 J. Energy, Nat. Resources & Envt'l L. 181, 235 (1992) ("[representatives of the oil transportation industry threaten to stop moving oil through United States ports unless they receive some relief from exposure to unlimited liability").

evidence in the record to establish that any 'incidental burden[ ] on interstate and foreign commerce [is] clearly excessive in relation to the putative local benefits.' " 148 F.3d at 1069. In addition, Petitioners can not provide any evidence that even if the BAP regulations have an extraterritorial impact, that impact is anything more than "incidental or indirect." *Id.*[37]

K. International law authorizes the State of Washington to enact police power regulations extraterritorially.

The BAP regulations necessarily govern a vessel before it enters Washington internal waters. This extraterritorial policy is authorized by international law: a vessel must be in compliance with regulations to protect the marine environment the moment it begins to navigate directly toward internal waters. "In case of ships *proceeding to* internal waters, the coastal State [i.e., nation] shall . . . have the right to take the necessary steps to prevent any breach of the conditions *to which admission of those ships to those waters is subject.*" UNCLOS, Art. 25(2) (emphasis added). When a tanker navigates toward Washington's territorial and internal waters, the BAP regulations necessarily become implicated.

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37. Petitioners rely upon *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 439 (1979) and *United States v. Pink*, 315 U.S. 203 (1942). These cases are distinguishable from the case at bar. In *Japan Line*, the Court invalidated a local property tax on foreign-owned shipping containers. Because of the potential for double taxation, the Court found a manipulation of international trade for the state's economic benefit, a finding of economic protectionism. There has been no offer of evidence or authority to allege that any BAP regulation will provide any discriminatory economic trade protection.

In *Pink*, the Court held that a state court's jurisdictional ruling directly hampered U.S. recognition of a foreign government; "The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system." *Id.* at 233.

1. Constitutional law authorizes the BAP regulations seaward of three nautical miles.

Oil spills are migratory. Before oil tankers which are seaward of Washington's territorial domain actually enter the Strait of Juan de Fuca or the Columbia River, the economy and environment of the State remain subject to damage from an offshore oil spill. A state may exercise its police powers outside of its offshore territorial jurisdiction where there is an integral nexus between the state's interest and the activity sought to be regulated *See Skiriotes v Florida*, 313 U.S. 69 (1941). The BAP regulations are not aimed at effecting the legality of international vessel standards, but rather at protecting state coastal waters and resources.

Under traditional police power analysis, the states are free to determine where, along their coastal zones, activities will affect their territorial waters. *Skiriotes*, at 76. Regulations governing extraterritorial activities which are designed to prevent impacts within the state are "not an extraterritorial assertion of jurisdiction." *Laker Airways v. Sabena Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984). The migratory nature of oil spills provides the integral nexus reflecting Congressional purposes and state interests in preventing spills in the first instance.[38]

38. In *Skiriotes*, the Court ruled that a state could regulate sponge diving by a Florida resident upon the high seas. The Court noted that the state clearly had an interest in conservation and management of the fishery and that, absent a conflict with federal legislation, such regulation was within a state's police power. *Id.* at 75. In *Bayside Fish Flour Co. v Gentry*, 297 U.S. 422 (1936), the Court addressed the use of offshore police powers where interstate commerce was at issue. The *Bayside* Court held that both citizens and non-citizen fishermen could be subject to state police powers where an activity occurred more than three nm. offshore. *Id.* at 426. The Court held that although the state regulations indirectly and incidentally affected interstate commerce, the "provisions had a reasonable relation to the object of their enactment." *Id.* As the District Court noted, "[a]lthough these cases deal with fisheries rather than the prevention of oil pollution, the principle remains the same." 947 F. Supp. at 1500.

Petitioners failed to provide the Ninth Circuit with any evidence that even if the BAP regulations have an extraterritorial impact, that the impact is anything more than "incidental or indirect." 148 F.3d at 1069.

CONCLUSION

The Washington BAP regulations should be sustained.

Respectfully submitted.

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UNITED STATES OF AMERICA, *PETITIONER*,
v.
GARY LOCKE ET. AL., *RESPONDENTS*.

INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), *PETITIONER*,
v.
GARY LOCKE ET AL., *RESPONDENTS*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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STATEMENT

The environmental damage caused by oil spills from tankers can be catastrophic. In 1989, the *Exxon Valdez* tore open on rocks and dumped eleven million gallons of oil into Prince William Sound, Alaska. The damage to that state's citizens and environment lingers to this day. Although Washington has not suffered a similar catastrophe, its waters present navigation hazards in excess of Prince William Sound. JA at 124. Several near-disasters have been avoided by good fortune. JA at 65, 126-27.

The *Exxon Valdez* spill focused the attention of both Congress and the states on the risks posed by oil tankers. Congress responded by enacting the Oil Pollution Act of 1990, Pub. L. No. 101-380, August 18, 1990, 104 Stat. 484. The Oil Pollution Act (OPA 90) coordinates and enhances several aspects of the federal prevention, response, liability, and compensation regimes that deal with vessel-caused pollution. Washington responded to the *Exxon Valdez* disaster and other casualties by requiring tanker companies to file oil spill prevention plans and by conducting annual safety inspections to determine compliance with such plans. These requirements of Washington's oil spill prevention plans are the subject of this litigation.

A. Washington's Waters Are A Priceless Resource

Washington's waters contain some of the richest and most diverse eco-systems in the world. The outer coast consists of wave-exposed rocky headlands separated by stretches of sand and gravel beaches, plus two large estuaries, Grays Harbor and Willapa Bay. Puget Sound is a large internal sea with habitat ranging from muddy bays to open rocky shores. The Strait of Juan de Fuca is a transition zone between the wave-exposed coast and the quieter Puget Sound waters. Recreational use is extensive; there are over ninety parks located on or adjacent to Puget Sound, with an annual estimated visitation of over fifty-five million. JA at 180-90.

Washington's citizens live and work in the cities, towns, and rural areas around Puget Sound.

Shoreline vegetation covers 2,500 miles of Washington coast, providing a major link in the food chain. In addition to food, coastal habitat provides refuge from predators and a place for reproduction and raising off-spring. JA at 153-57. Washington waters support thousands of species of plants and animals. JA at 137-43. At least 125 species of birds spend some part of the year in Washington waters; sixty species winter here and fifteen species come in the summer to breed. JA at 162-71.

Washington is also home to five species of salmon and many other fish species, plus shrimp, clams, oysters, and scallops. Washington fisheries are important as both a commercial and a recreational resource. In 1993, the wholesale value of the commercial fishery was $354 million, sports anglers caught 475,632 salmon, and 1,252,177 pounds of clams were harvested. Fisheries also are significant to the economy and culture of treaty Indian tribes. JA at 174-78.

B. An Oil Spill Could Be Devastating To Washington's Citizens And Environment

Washington's waters are particularly vulnerable to damage from a spill. In Puget Sound, the water exchange is limited so that sediments in shallow areas would be heavily contaminated. JA at 193. Even on the rocky coast, damage could be extensive because it is home to long-lived, slow-growing species, such as mussels, that do not disperse well. JA at 142-43.

The effects of an oil spill in Washington waters will depend on a number of factors, such as the location of the spill, the number of gallons involved, and the type of oil. Heavy oil can kill invertebrates and plants outright. JA at 142. Birds, such as ducks, that live on the water are highly susceptible to

hypothermia after exposure to oil.[1] If fish and wildlife are not killed outright, their tissues likely are tainted by oil. Some species, such as clams, retain oil in their tissues for many months, destroying livelihoods and endangering human health. Animals will be constantly recontaminated by oil leaching out of the sediment. Fisheries will be shut down entirely after a spill. JA at 141-42. Washington's fisheries could suffer permanent damage through destruction of habitat and genetic damage. JA at 198. Recreational enjoyment and the lives of millions will be affected. JA at 141, 178, 181, 195, 201-02.

C. Navigation In Puget Sound Is Difficult

Most tanker traffic in Washington is through Puget Sound to refineries located both to the north and south.[2] JA at 120, 122-23. The Puget Sound area is extremely difficult to navigate. JA at 124. Tankers enter Puget Sound through the Strait of Juan de Fuca. Exhibit 34 is a chart of the Strait of Juan de Fuca and the northern part of Puget Sound.[3] The western end of the Strait has persistent fog, and it is heavily fished, causing congestion problems. JA at 123.

Tankers bound for the northern refineries must negotiate between Hein Bank and Smith Island where the waterway is narrow and congested. The tankers continue to the northeast and shoot the gap between Davidson Rock and Lawson Reef with dangerous obstacles on the edge of traffic lanes. At this point, the vessel turns north to enter Rosario Strait. As illustrated on Exhibit 34, Rosario Strait is too

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[1] Between 175,000 and 300,000 Common Murres were killed in the *Exxon Valdez* spill. The estimates of dead eagles from the *Exxon Valdez* spill range from 200 to over 900. Between 3,500 and 5,000 sea otters died as a result of the *Exxon Valdez* spill. JA at 194-97.

[2] Although there is some tanker traffic on the Columbia River, most oil is transported on the river by tank barge. JA at 120. This case challenges spill prevention plans for tankers.

[3] Exhibit 34 (Affidavit of Stanley J. Norman, JA at 88) has been lodged with the Court and served on the parties.

narrow for traffic lanes and one-way traffic for tankers is necessary. JA at 122.

Tankers bound for the two Anacortes refineries proceed up to the vicinity of Shannon Point, turn right, pass through the narrow Guemes Channel, and proceed to shallow Padilla Bay, where the refineries are located. The currents in the Guemes Channel are extremely strong, with frequent fog and a significant range of tides. Tankers bound for the Cherry Point and Ferndale refineries continue up Rosario Strait, past such obstacles as Peapod Rocks and Lummi Rocks. JA at 122-23.

Exhibit 33 is a chart of southern Puget Sound.[4] Tankers southbound for Tacoma transit broader waterways, but they are frequently more congested than the ones going north. There are also myriad obstructions close to the western side of the southbound traffic lane. JA at 124.

D. Washington's Rules Protect State Waters From Oil Spills

In 1991, the Washington Legislature acted to protect "some of the most unique and special marine environments in the United States". 1991 Wash. Laws ch. 200, § 101. The Legislature recognized that these marine environments were threatened by "billions of gallons of crude oil and refined petroleum products . . . transported by vessel on the navigable waters of the state [each year]". *Id.* The Legislature concluded that "prevention is the best method to protect the unique and special marine environments in this state". *Id.*

Under the 1991 law, all companies that operate tankers headed into Washington waters through the Strait of Juan de Fuca or the Columbia River are required to file oil spill prevention plans that meet certain requirements. Wash. Rev. Code § 88.46.040(1). These planning requirements provide "the best achievable protection [BAP] from damages caused by

[4] Exhibit 33 (Affidavit of Stanley J. Norman, JA at 88) has been lodged with the Court and served on the parties.

the discharge of oil into the waters of the state". Wash. Rev. Code § 88.46.040(3). The state conducts annual inspections of tankers docked in Puget Sound to ensure they comply with their company's oil spill prevention plan. Wash. Rev. Code § 88.46.030(1), (3). State inspectors must coordinate their inspections with the Coast Guard and any violations of Coast Guard or other federal regulations must be reported to the appropriate federal agency. Wash. Rev. Code §§ 88.46.030(4), .170(2). State inspections take place when the vessel is in port. Wash. Admin. Code §§ 317-31-210(3); 317-21-550(1).

It is unlawful to operate a tanker in Washington waters without an approved prevention plan. The 1991 law provides civil and criminal penalties against the owner or operator if there is a violation. Wash. Rev. Code §§ 88.46.080-.090.[5]

Washington developed its regulations with Coast Guard input, as well as extensive reliance on advisors with expertise. JA at 94-95. Washington's requirements focus on the human element of operations in Puget Sound rather than design and technology.[6] As stated by Coast Guard, sixty-five to eighty percent of marine casualties are caused by human error. JA at 133. The Coast Guard's maritime safety program spends eighty percent of its available resources addressing design and technical requirements. JA at 133.

[5] The law also provides that the state may deny entry into state waters to any covered vessel that does not have a spill prevention plan. Washington has neither the authority nor the ability to actually deny entry into state waters. The state enforcement power is limited to civil and criminal penalties.

[6] The state's only rule regarding technological equipment, Wash. Admin. Code § 317-21-265, was struck down by the Court of Appeals. *International Ass'n of Independent Tanker Owners v. Locke*, 148 F.3d 1053, 1066-67 (9th Cir. 1998); Intertanko App. at 29a-32a. State respondents do not seek review of this ruling.

1. Operations Required While In Or Near Washington Waters

A number of Washington's requirements are performed in or near Washington waters.[7] For example, Washington requires that the navigation watch in Washington waters consist of at least two licensed deck officers. Wash. Admin. Code § 317-21-200(1). (The Coast Guard imposes the same requirement for tankers. 33 C.F.R. § 164.13(c).) A tanker not equipped with automatic stand-by switching gear for standby generators must operate with stand-by generators running and immediately available to assume the electrical load while underway in state waters. Wash. Admin. Code § 317-21-210(1). Washington requires the position of a vessel to be recorded at fifteen minute intervals or less. Wash. Admin. Code § 317-21-205(1). (The Coast Guard requires the position of the vessel to be plotted on a chart of the area. 33 C.F.R. § 164.11(c).)

A few examples illustrate how these requirements are appropriate measures for spill prevention in Washington.

Navigation Watch During Restricted Visibility

A navigation watch has three primary functions: navigation, collision avoidance, and administration. When visibility is not restricted, two officers can perform this workload. During restricted visibility, a great deal more attention must be paid to navigation and collision avoidance. JA at 99. When a tanker is operating in restricted visibility, as determined by the vessel master or officer in charge, a Washington oil spill prevention plan requires three licensed deck officers, one of whom may be a pilot, on the navigation watch in pilotage waters. Wash. Admin. Code § 317-21-200(1)(a). A third deck officer will significantly decrease human-caused error during the long and stressful transit through the Strait of Juan de Fuca and Puget Sound. JA at 207.

[7] Examples include Wash. Admin. Code §§ 317-21-200(1), (3)-(6); -205(1)-(3); -210(1)-(4); -215(1)-(10); -225; -235(1); -245.

Fix Intervals

A tanker proceeding at its normal cruising speed will travel approximately four miles in fifteen minutes. JA at 105. The oil spill prevention plan requires the position of a tanker to be recorded at fifteen minute intervals or less. Wash. Admin. Code § 317-21-205(1). This addresses the particular risks of the narrow, twisting confines of the Strait of Juan de Fuca and Puget Sound, illustrated in Exhibits 33 and 34.

Anchor Watch

Washington has a history of problems with vessels dragging anchor. This is a major hazard for colliding with another vessel or running aground. JA at 102-03. Washington requires a licensed deck officer to maintain watch on the bridge while a tanker is anchored. The officer also is required to continually monitor the position of the vessel at anchor and plot its position at least once an hour. Wash. Admin. Code § 317-21-200(5).

Prearrival Tests And Inspections

Washington oil spill prevention plans require a series of tests and inspections that must be performed shortly before the vessel enters Washington waters. Wash. Admin. Code § 317-21-215. The prearrival inspection requirement protects against a frequent cause of problems—an undiscovered, but pre-existing, mechanical failure. JA at 208. A failure of critical navigation and engineering equipment subsystems could result in a grounding or collision and subsequent oil spill in the confines of Puget Sound. JA at 110.

2. Other Spill Prevention Requirements Directly Related To Protecting Washington Waters

A second category of spill prevention requirements protect Washington waters, but do not necessarily involve

operations performed exclusively in Washington waters.[8] Some mirror Coast Guard requirements, while others add on to existing Coast Guard requirements.

Training Policies

Washington requires that the oil spill prevention plan explain how the company has provided training to its crews and lists training criteria. Wash. Admin. Code § 317-21-230. Training is vital to oil spill prevention since sixty-five to eighty percent of all vessel accidents and casualties are caused by human error. JA at 111.

Drug And Alcohol Testing

Washington requires all companies to establish testing programs consistent with those required by the Coast Guard in 33 C.F.R. Part 95 and 46 C.F.R. Part 4, except 46 C.F.R. § 16.500 . The Washington standard goes further by requiring the company to include random alcohol tests, and by applying the requirement to foreign flag vessels. Wash. Admin. Code § 317-21-235. The purpose of the testing program is to prevent crew members from being intoxicated and unable to perform their duties. JA at 114-15.

Language

Washington requires licensed deck officers and the vessel's designated person in charge to communicate in English and a language understood and spoken by subordinate officers and unlicensed crew. Wash. Admin. Code § 317-21-250(1). English language communication is critical. For example, in the area west of Port Angeles before a pilot boards the vessel, deck watch officers with limited English have trouble communicating with the Coast Guard Vessel Traffic system, as well as other vessels, when they are required to talk to them to arrange safe passage in collision avoidance situations. JA at 123-24.

[8] Wash. Admin. Code §§ 317-21-200(2), -220, -230, -235(3), -250, -255, -260.

E. Congress Enacted The Oil Pollution Act To Prevent And Respond To Oil Spills From Tankers

Washington required oil spill prevention plans and compliance with BAP rules shortly after Congress enacted the Oil Pollution Act. Congress enacted the Oil Pollution Act based on expressions that spill prevention was critical. In the words of one Senate Report:

> "[A]ny oil spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment. *Consequently, preventing oil spills is more important than containing and cleaning them up quickly.*" S. Rep. No. 101-94, 101st Cong., 1st Sess., pp. 2-3 (1990) (second italics ours), *reprinted in* 1990 U.S.C.C.A.N. 724.

The Oil Pollution Act imposed new federal requirements to prevent oil pollution from tankers. Prevention measures included review of drug and alcohol abuse in issuing licenses, certificates of registry, and merchant mariners documents;[9] random drug testing and suspension of licenses, certificates of registry, and merchant mariners documents for drug and alcohol abuse;[10] and a requirement that working hours on a tanker be no more than fifteen hours in any twenty-four-hour period and no more than thirty-six hours in any seventy-two-hour period.

In pursuit of the highest standards of prevention, Congress departed from international standards in several respects. Congress required tankers be constructed with double hulls by January 1, 2015.[11] This requirement applied to both United States and foreign flag tankers. Furthermore, the secretary of transportation (secretary) was required to adopt rules for single hull tankers operating in United States waters to

[9] OPA 90 § 4101; State App. at 51a-52a.

[10] OPA 90 § 4103; State App. at 54a-57a.

[11] OPA 90 § 4115(a); State App. at 72a-77a.

"provide as substantial protection to the environment as is economically and technologically feasible". OPA 90 § 4115(b); State App. at 77a-78a. Congress departed from norms advocated by international organizations.[12]

The Oil Pollution Act also required the secretary to adopt rules governing tanker operations with the auto-pilot engaged or with an unattended engine room.[13] Congress also required the secretary to designate waters on which tankers must have at least two licensed deck officers on the bridge.[14] Although these subjects might also fall within the jurisdiction of the flag state, the Coast Guard concluded that the rules should "apply to foreign flag tankers and U.S. tankers sailing on registry because these tankers pose a similar risk to the environment". 58 Fed. Reg. 27628 (1993).

In addition to its increased prevention measures, the Oil Pollution Act contained new provisions imposing federal liability for spills and damage to natural resources.[15] And it imposed new requirements for demonstrating financial responsibility.[16] These provisions also departed from the international regime for oil pollution liability and compensation.

In enacting the Oil Pollution Act, Congress considered the question of preemption and expressly indicated its intent to

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[12] In its 1996 rulemaking for single hull tankers, the Coast Guard responded to comments that it was "undermining the international process; that competency and manning requirements fall under flag state jurisdiction; and the [rule] goes beyond international requirements in some cases". 61 Fed. Reg. 39771 (1996). The Coast Guard responded by stating: "Where international standards do not address certain operations, the Coast Guard has met the intent of Congress by issuing these rules to ensure that specific vessels reduce their accident risk." *Id.*

[13] OPA 90 § 4114(a); State App. at 70a.

[14] OPA 90 § 4116(b); State App. at 84a.

[15] OPA 90 §§ 1002-1006; State App. at 8a-25a.

[16] OPA 90 § 1016; State App. at 39a-42a.

save state authority from preemption. Section 1018(a)(1) expressly saved from preemption "the authority of any State" to impose "any additional liability or requirements with respect to" both "the discharge of oil" and "any removal activities in connection with such a discharge". Section 1018(a)(2) stated that Congress did not "affect or modify in any way the obligations or liabilities of any person under . . . State law, including common law". Section 1018(c) stated that Congress had not affected the authority of "any State" to "impose additional . . . requirements . . . relating to the discharge, or substantial threat of a discharge, of oil".

SUMMARY OF ARGUMENT

The police powers of the states are not preempted except to the extent they conflict with federal law, or where Congress has made clear and manifest its intent to preempt. This strong presumption against preemption applies to preserve Washington's oil spill prevention laws. The presumption is not lessened because Washington's regulations apply to foreign commerce or maritime activities. Even treaties with foreign nations are carefully construed to save the sovereign powers of the states.

Congress did not expressly preempt state law. Petitioners, therefore, rely on the Ports and Waterways Safety Act of 1972 (PWSA) and amendments to that law to claim that Congress impliedly preempted state law in broad fields. This broad field preemption assertion fails because the boundaries of the fields are not carefully limited to fields where federal law leaves no room for state oil spill prevention laws. Petitioners have failed to show real, irreconcilable conflicts that imply Congressional intent to displace states from fields addressed by oil spill prevention plans.

In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), this Court held that Title II of the PWSA preempted the field of tanker design and construction. The Court's holding and its reasoning does not extend to other subjects listed in Title II of the PWSA. The Court specifically distinguished manning and

operational requirements, such as a local pilot and a tug escort, from design and construction. Petitioners' argument draws an unwarranted inference of preemption by simply labeling state laws with subjects of rulemaking under Title II. This expansion of *Ray* is inconsistent with the decision and other preemption decisions of this Court.

By enacting § 1018 of the Oil Pollution Act, Congress demonstrated its understanding that, except for the field of design and construction adjudicated in *Ray*, other fields were not preempted. The language of that savings provision is broad and refers to any requirements imposed by states with respect to the discharge and potential discharge of oil. Congress would not enact a broad saving of state power in § 1018, if there were no state powers to be saved.

The treaties entered into by the United States do not conflict with Washington's law. The standards described by treaties are not self-executing and require the signature governments to adopt laws for implementation. Although the United States agrees to accept certificates issued by foreign flag states regarding certain matters, no conflict is presented with that system. Washington does not control ships to verify such certificates or act in conflict with federal actions. Washington directs its regulations to tanker companies and implements safety audits to determine whether owners and operators follow their oil spill prevention plans.

Nor are Washington's requirements in conflict with federal law. There is no claim of physical impossibility. Washington's law does not stand as an obstacle to achieving the objectives of Congress. From the PWSA to the Oil Pollution Act, the objective of Congress is to prevent oil spills and to allow states to further that objective. Washington law serves this core purpose and presents no conflicts with any federal statute or rule.

Congress has not, under Title I of the PWSA, preempted all state law that might address the same subject matter as a Coast Guard regulation. Under normal rules of

preemption, a state rule should not be preempted unless it presents physical conflicts or obstacles to a lawful Coast Guard rule. This may occur under Title I if the Coast Guard adopts safety standards that are specific to Puget Sound. Only then can there be a determination as to whether there is meaningful conflict between state and federal law.

ARGUMENT

A. There Is A Strong Presumption Against Preemption Of State Police Power

"In all pre-emption cases, and particularly in those in which Congress has 'legislated in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Both Intertanko and the federal government attempt to undermine this strong presumption.

1. Intertanko relies on the maritime context of the state oil spill prevention plan to argue that this Court should disregard or reorder the federalism relationship of the states and the federal government. Intertanko argues that regulation of ships in maritime commerce is a field in which state law is presumptively preempted, citing to a general need for uniformity. Intertanko Br. at 20. Assorted amici make the related argument that maritime law reflects a penumbra of federal interests and that there is no historic state interests. *E.g.*, Amicus Brief of Products Liability Council, et al., at 4. This Court has already rejected similar arguments. In *Askew v. American Waterways Operators*, 411 U.S. 325 (1973), this Court refused to

> "allow federal admiralty jurisdiction to swallow most of the police power of the States over oil spillage – an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the

> life of the ocean and the lives of the coastal people are greatly dependent." *Askew*, 411 U.S. at 328-29.

Askew, thus, affirmed that the states' historic police powers extend beyond liability and include setting requirements for preventing oil spills. State power was not preempted by complex federal regulations affecting maritime safety and the environment.[17]

For 150 years, this Court has consistently held that the states retain inherent sovereign powers to protect their citizens and their environment from risks presented by maritime activities, except to the extent that state law conflicts with federal law or when Congress has used its power to preempt state law from a subject. *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1851) (Congress had not acted to preempt state power to require pilotage); *Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co. v. Board of Trustees of the Town of Catlettsburg*, 105 U.S. (15 Otto) 559, 562 (1882) (local authorities may regulate anchoring and wharfing); *Huse v. Glover*, 119 U.S. 543, 548 (1886) (fee on boats using locks); *Morgan's Louisiana & T.R. & S.S. Co. v. Board of Health of the State of Louisiana*, 118 U.S. 455, 465-66 (1886) (states have power to impose quarantine and inspection measures for ships arriving from international commerce).

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[17] *Askew* explained that *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and its progeny "mark isolated instances" where state law was affected by a need for uniform federal maritime law. *Askew*, 411 U.S. at 388; *see also Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 118 (1962) ("we must candidly acknowledge that the decisions between 1917 and 1926 produced no reliable determinant of valid state law coverage"); *American Dredging Co. v. Miller*, 510 U.S. 443, 458-62 (1994) (Stevens, J., concurring, questioning viability of *Jensen*). Petitioner Intertanko, however, quotes *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924), the progeny of *Jensen*, to argue that maritime commerce requires uniformity in all regards, implying that there is no room for any state laws affecting tankers. Intertanko Br. at 20.

In *Kelly v. Washington*, 302 U.S. 1 (1937), the Court upheld state authority to inspect the hulls and machinery of motor vessels for general safety purposes in the face of "a maze of [federal] regulation". *Id.* at 4-5. The Court rejected the broad and undefined preemption of maritime matters urged here by Intertanko and amici:

> "There is no constitutional rule which compels Congress to occupy the whole field. . . . [T]he exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot "be reconciled or consistently stand together." *Kelly*, 302 U.S. at 10.

To be sure, *Kelly* recognized that Congressional action could preempt state law, but preemption was narrowly confined.

In *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), the Court held that states may regulate pollution from ships to protect their citizens and environment, in spite of a federal license for the boiler on the offending ship. *Id.* at 442. Congressional intent to preempt "is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State". *Id.* at 443 (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)). *Huron* also notes that Congress had recognized that air pollution caused peculiarly local harms, which further contradicted the ship owner's argument that Congress impliedly displaced state power to criminally cite a shipowner violating state air pollution laws. *Id.* at 446.

In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), this Court struck down Washington requirements for tanker design and construction, while upholding state operational requirements, such as a local pilot on registered vessels and a tug escort for tankers in state waters. In reviewing the same police powers at issue here, the Court affirmed that the presumptions against preemption of state laws applied. *Ray*, 435 U.S. at 157 ("historic police powers of the States were not

to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress") (quoting *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230 (1947)).

2. The government seeks to connect the state's regulations to an area addressed in international treaties and conventions to seek a special preemption if state regulation "hinders" the Nation's conduct of its foreign affairs. U.S. Br. at 29, 47. The government's attempt to equate "preemption by treaty" to "interference with the federal government's exclusive authority to conduct the foreign affairs" (U.S. Br. at 29) ignores how these two subjects present different problems.

Washington does not contend that it can violate a lawful treaty entered into by the United States nor does it attack any treaty entered into by the United States. Petitioners, however, fail to identify treaty provisions that have been violated. As shown below at Part E (Argument), pages 30-34, Washington violates no self-executing treaty requirements. Cases such as *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), which involve state actions that violated an international agreement, have little relevance to this case.

Petitioners incorrectly invoke this Court's prior decisions concerning interference with "foreign affairs". These "foreign affairs" cases involve discriminatory treatment of aliens or foreign citizens. *See Hines v. Davidowitz*, 312 U.S. 52 (1941); *Zschernig v. Miller*, 389 U.S. 429 (1968). *Hines* struck down a Pennsylvania statute that required aliens to register because it imposed "distinct, unusual and extraordinary burdens and obligations upon aliens" (*Hines*, 312 U.S. at 65) in direct conflict with comprehensive federal registration laws (*id.* at 66-68) and in conflict with the constitutional choice that the power to regulate and register aliens is not concurrently shared with the states (*id.* at 68-69). *Zschernig* invalidated an Oregon law that provided that an estate would escheat to the state rather than go to an heir living in a communist country, again imposing a discriminatory burden based on foreign status

that was not "incidental or indirect". *Zschernig*, 389 U.S. at 434-35.

The government contends that *Hines* compels a conclusion that Washington's power to prevent oil spills operates in "the narrowest of limits". U.S. Br. at 29. This argument ignores how that description of state power in *Hines* was expressly based on the nature of Congress' exclusive power over naturalization and the direct connection between state discrimination and foreign relations. *See Hines*, 312 U.S. at 66, 68-69. State power should not fall within the "narrowest of limits" simply because foreign commerce is affected in a non-discriminatory manner. The government's expansive reading of *Hines* incorrectly creates a presumption against state power, without any showing of impact on foreign relations. *See also Pink*, 315 U.S. at 230 ("even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy").

B. Standards For Preemption Of State Oil Spill Prevention Laws

1. The central issue in this case is whether Congress has preempted state power to regulate oil tankers to prevent oil spills and, if so, how to define the scope and nature of that preemption. Preemption is fundamentally a question of Congressional intent. *English v. General Electric Co.*, 496 U.S. 72, 79 (1990). Congressional intent to preempt state law can either be express or implied. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983).

2. Express preemption occurs when Congress expressly states its intent to preempt in the language of a statute. *Jones v. Rath Packing Co.*, 430 U.S. 519, 530 (1977) (Federal Meat Inspection Act expressly prohibited "marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under" the Act); *Shaw*, 463 U.S. at 91 (federal Employee Retirement Income Security Act (ERISA) preempts "any and all State laws insofar as they may

now or hereafter relate to any employee benefit plan covered" by ERISA).

3. The Court has recognized two types of implied preemption. The first is labeled implied field preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) ("state law is pre-empted if . . . federal law so thoroughly occupies a legislative field as to make reasonable the inference that congress left no room for the State to supplement it") (citation omitted) (internal quotation marks omitted). The second is conflict preemption. A "state law is pre-empted if that law actually conflicts with federal law". *Id.* A state law is in conflict with a federal law to the extent "it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress'". *California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989) (citations omitted).[18]

4. The most difficult problem where there is a claim of field preemption is defining "the boundaries of the pre-empted field" (*English*, 496 U.S. at 82) where Congress has left no room for state law. In determining the existence and scope of field preemption, there are three principles often used by this Court that are relevant to determining Congressional intent in this case. First, no "intent to pre-empt may be inferred from the comprehensiveness of the" federal statutes or regula-tions at issue in a case. *Hillsborough Cy. v. Automated Medi-cal Lab., Inc.*, 471 U.S. 707, 716-17 (1985); *New York State Dep't of Social Serv. v. Dublino*, 413 U.S. 405, 415 (1973).

Second, the conflict between the state law and the field of federal law must be real, not speculative. "The existence of a hypothetical or potential conflict is insufficient to warrant the

[18] The Court has indicated that the labels used to describe conflict and field preemption are not "rigidly distinct". *See Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 104 n.2 (1992).

pre-emption of the state statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (state statute did not irreconcilably conflict with federal antitrust laws). Preemption does not arise because of a mere "tension" between the state law and the field claimed to be preempted. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (state law claims for compensatory and punitive damages undoubtedly affect the field of federal nuclear safety); *English*, 496 U.S. at 85-86, 90 (enjoining "seeking out conflicts between state and federal regulation where none clearly exists"). To determine if there is an irreconcilable conflict between state law and a field of federal law, the "key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted". *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 107 (1992); *see also id.* at 110 (Kennedy, J., concurring in part and concurring in the judgment) ("a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act").

Finally, an intent to preempt state law is not inferred when state law is coincidental to federal requirements, or when state law is enforcing a federal law. *California v. Zook*, 336 U.S. 725, 729-30 (1949) ("Coincidence is only one factor in a complicated pattern of facts guiding us to congressional intent."). When Congress has addressed the same subject matter as a state law, this coincidence "begs the only controversial question: whether Congress intended to make its jurisdiction exclusive". *Id.* at 731.

5. When these principles of implied preemption are applied to the instant case, the petitioners' overbroad assertions of field preemption must be rejected. Petitioners do not identify narrow fields where there is no room for state law. Rather, an examination of *Ray*, the Oil Pollution Act, and the Washington oil spill prevention plan law confirms that Congress has left room for the states to lower the risks of devastating oil spills.

C. Title II Of The Ports And Waterways Safety Act, As Interpreted By *Ray v. Atlantic Richfield Co.*, Does Not Establish Broad Field Preemption Of State Police Power

1. The federal government makes much of the fact that Congress has a long history of regulating maritime commerce. U.S. Br. at 18-24. The government points to this history to support its conclusion that Congress intended to preempt the requirements for Washington's oil spill prevention plans.

We draw the opposite conclusion. Congress has not acted to expressly preempt state police power as it relates to maritime commerce, and neither petitioner claims that Washington's requirements have been expressly preempted. Yet the history recited by the government demonstrates that states have, since the Constitution was ratified, applied their police power to maritime commerce. If Congress truly intends to preempt state regulation in this area, it has the power to state its intentions clearly and unambiguously.

2. Since Congress has not expressly preempted state law, petitioners argue that Title II of the Ports and Waterways Safety Act, as amended, impliedly establishes a broad field preemption of state police power in the area of vessel "design, construction, alteration, repair, maintenance, operations, equipping, personnel qualification, and manning". 46 U.S.C. § 3703(a). Intertanko claims that all of Washington's requirements fall within these broadly stated fields. Intertanko Br. at 23. The federal government argues that some requirements fall within similarly labeled fields but, except for providing a few examples, has not specifically identified which ones. U.S. Br. at 33-41. Petitioners pin their broad field preemption arguments to this Court's opinion in *Ray*.

Petitioners' interpretation of Title II is not well taken. In *Ray*, this Court was careful to define the boundaries of the field. The field preemption identified by this Court in *Ray* was narrow and dealt only with tanker design and construction. According to this Court: "Title II's principal concern is tanker

design and construction". *Ray*, 435 U.S. at 161. Having defined the field, the Court preempted only state design and construction requirements, because of the irreconcilable conflict with federal design and construction requirements. Contrary to petitioners' suggestion, the Court did not hold that all the subjects in Title II of the PWSA were similarly preempted.

3. The government argues that *Ray* applies to all the subjects in Title II and that the Court discussed tanker design and construction only "because those were the subjects of the claim before the Court". U.S. Br. at 26.[19] This argument is not correct. *Ray* also considered, and upheld, state requirements for a state pilot on registered vessels and for a tug escort. The Court was careful to distinguish these valid requirements from design and construction. In sustaining the pilotage requirement, the Court specifically noted the requirement for a state pilot was not a design requirement. The Court said:

> "Of course, that a tanker is certified under federal law as a safe vessel insofar as its design and construction characteristics are concerned *does not mean that it is free to ignore otherwise valid state* or federal *rules or regulations that do not constitute design or construction specifications. Registered vessels*, for example, as we have already indicated, *must observe Washington's pilotage requirement.*" *Ray*, 435 U.S. at 168-69 (emphasis added).

With regard to the tug escort requirement, the Court said:

> "*A tug-escort provision is not a design requirement*, such as is promulgated under Title II. *It is*

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[19] The United States also argues that the field is preempted because Congress's goal was to create international uniformity. U.S. Br. at 26. This argument misreads the purpose of Congress. As reaffirmed by the Oil Pollution Act, the main goal of Congress has been to prevent oil spills, and Congress has put prevention ahead of international uniformity. *See* Statement, Part E *supra* p. 9-10.

> *more akin to an operating rule* arising from the peculiarities of local waters[.]" *Id.* at 171 (emphasis added).

Thus, in *Ray*, this Court carefully limited the field to tanker design and construction and found no Congressional intent to preempt other fields mentioned in Title II.

4. Where *Ray* was based on an actual irreconcilable conflict between state and federal design and construction standards, petitioners' field preemption argument amounts to little more than a labeling exercise. They attach a label, such as "manning", to Washington's requirements and then claim it falls into a preempted field because 46 U.S.C. § 3703(a) lists "manning" as an area for regulation. Under this theory, however, the tug escort requirement in *Ray* should have been preempted because it could be labeled an "operation", which is also listed in 46 U.S.C. § 3703(a).

No other decision of this Court turns field preemption into a labeling exercise. Field preemption can be described as a species of conflict preemption. *English*, 496 U.S. at 79 n.5; *Gade*, 505 U.S. at 104 n.2 (O'Connor, J.); *Gade*, 505 U.S. at 114 (Souter, J., dissenting). To have implied field preemption, the field must be carefully limited to a subject where Congress has left no room for state regulation. A state requirement must be examined to see if there is an irreconcilable conflict with a Congressional scheme. The Court followed this method of analysis in *Ray*. It concluded that the field of design and construction was preempted, essentially because a tanker can have but one blueprint for design and construction. The Court said:

> "This statutory pattern shows that Congress, *insofar as design characteristics are concerned*, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States. This indicates to us that *Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent*

> *state requirements.* In particular, as we see it, Congress did not anticipate that a vessel found to be in compliance with the Secretary's design and construction regulations and holding a Secretary's permit, or its equivalent, to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States on the *ground that its design characteristics constitute an undue hazard.*" *Ray*, 435 U.S. at 163-64 (emphasis added).

This reasoning does not apply generally to the broad categories of federal regulations that petitioners contend are field preempted. While it is clear a tanker can have only one blueprint, it is equally clear that operational requirements can change from port to port, and they must at all times respond to local risks and needs.

5. Petitioners also rely on minor textual signals, such as the directive that the secretary "shall" adopt rules. U.S. Br. at 26; Intertanko Br. at 21-22. No other case relies on the difference between "shall" and "may" to infer that Congress impliedly displaced state law from a field. That explanation in *Ray* should be limited to an observation about design and construction rules. Standing alone, a Congressional directive to make rules does not imply, in any way, that state laws are preempted. Similarly, petitioners' observation that the secretary is directed to consult with states before rulemaking also has no implications regarding preemption of state police powers. Congress in the same sentence directed consultation with non-governmental environmental organizations. 46 U.S.C. § 3703(c).

6. Petitioners' broad field preemption arguments depend on an extension of *Ray* beyond its logic and holding. Most importantly, the labels obtained from Title II of the PWSA do not demonstrate that Congress left no room for Washington's oil spill prevention measures. No irreconcilable conflict arises from allowing the states to require a written oil spill prevention plan and to audit owners and operators for

compliance with those prevention measures. This Court should reject petitioners' reliance on broad arguments of field preemption to eliminate sovereign powers of the states when there is no Congressional expression nor regulatory scheme that requires that type of broad preemption of state laws.

D. Congress Expressly Preserved State Police Powers In § 1018 Of The Oil Pollution Act of 1990

1. While Congress has not expressly preempted state law, it has expressly declared its intention not to preempt state law in § 1018 of the Oil Pollution Act. This is important for two reasons. First, since preemption is based on the intent of Congress, § 1018 directly states Congress' intent. Second, § 1018 impliedly contradicts petitioners' expansive reading of *Ray*.

2. Section 1018 of the Oil Pollution Act, provides, in part:

> "(a) PRESERVATION OF STATE AUTHORITIES; SOLID WASTE DISPOSAL ACT.—*Nothing in this Act* or the Act of March 3, 1851 shall—
>
> (1) *affect, or be construed or interpreted as preempting, the authority of any State* or political subdivision *thereof from imposing any additional liability or requirements with respect to*—
>
> (A) *the discharge of oil or other pollution by oil within such State*; or
>
> (B) any removal activities in connection with such a discharge; or
>
> (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law.
>
> . . . .

> *(c) ADDITIONAL REQUIREMENTS AND LIABILITIES; PENALTIES.—Nothing in this Act*, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), *shall in any way affect, or be construed to affect, the authority of* the United States or *any State* or political subdivision thereof—
>
> (1) *to impose* additional liability or *additional requirements*: or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;
>
> *relating to the discharge, or substantial threat of a discharge, of oil.*" OPA 90 § 1018(a), (c) (emphasis added); 33 U.S.C.A. § 2718; State App. at 46a-47a.

3. The language of subsections 1018(a) and (c) is very broad. Section 1018(a) states that "[n]othing in this Act . . . shall (1) affect, or be construed or interpreted as preempting, the authority of any State . . . from imposing any additional . . . requirements with respect to (A) the discharge of oil or other pollution by oil within such state". Section 1018(c) states that "[n]othing in this Act . . . shall in any way affect, or be construed to affect, the authority of . . . any State . . . (1) to impose . . . additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil". On its face, this language confirms Congressional intent that the provisions of the Oil Pollution Act be pursued in a cooperative manner with the states without preemption of state laws.

The phrases "with respect to" and "relating to" are deliberately expansive, allowing states to determine which aspects of oil pollution they deem appropriate to regulate. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (law "relates to" an employee benefit plan if it has a connection with or reference to such a plan, even if it is not specifically designed to affect such plans, or the effect is only indirect);

Shaw, 463 U.S. at 96-97 ("A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."). Washington's spill prevention planning is among the most important requirements that a state might impose "with respect to" or "relating to" the discharge of oil.

4. Section 1018 supports the state's argument that no broad field preemption was ever intended by Congress in 1978 or since. By enacting the Oil Pollution Act and by enacting § 1018, Congress demonstrated its understanding that, except for the field of design and construction adjudicated in *Ray*, other fields were not occupied by federal law to the exclusion of state law. It would make no sense for Congress to express a broad savings of state powers from preemption in § 1018, if it had already preempted those state powers. Congress does not preempt state powers in such an ambiguous or duplicitous manner.

5. Both petitioners urge this Court to infer that the scope of § 1018 confirms that Congress intended to preempt state laws, because the Conference Report explained that: "The Conference substitute does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company*, 435 U.S. 151 (1978)." U.S. Br. at 42; Intertanko Br. at 47. Petitioners take the Conference Report's statement about *Ray* out of context. The report describes a broadly worded savings clause that could be understood as affecting the holding in *Ray*. According to the Conference Report

> "[S]ubsection (a) of section 1018 of the substitute states explicitly that *nothing* in the substitute, or the Act of March 3, 1851 (the Limitation of Liability Act), *shall affect in any way the authority of a State* or local government *to impose additional liability or other requirements with respect to oil pollution or to the discharge of oil* within that State . . .
>
> . . . .

> Similarly, subsection (c) clarifies that nothing in the substitute, the Limitation of Liability Act, or in section 9509 of the Internal Revenue Code shall affect in any way the authority of the United States or *any State* or local government to impose *additional* liability or *requirements*, or to determine the amount of, any civil or criminal penalty for any violation of law." H.R. Conf. Rep. No. 101-653, 101st Cong., 2d Sess., pp. 121-22 (1990) (footnote omitted) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 799-800.

The reference to *Ray* in the Conference Report confirms only that the broad language of § 1018 does not undo the careful holding in *Ray* that the field of tanker design and construction is preempted. *Ray*, however, did not hold that all the subjects listed in the PWSA defined the field to be preempted. *See* Argument, Part C *supra* p.20-24.

6. Intertanko makes several arguments that § 1018 does not reflect intent to preserve state authority to impose additional requirements. First, Intertanko relies on Judge Graber's dissent to the denial of rehearing *en banc*. Intertanko Br. at 45. The Oil Pollution Act began as S 686 on the Senate side, and as HR 1465 on the House side. S 686, sponsored by Senator Mitchell of Maine, contained virtually the same expression of non-preemption that appears in § 1018. S 686 also contained a second savings clause, section 310.[20] Although the Conference Report was silent about section 310, Judge Graber reasoned that since the Conference Committee dropped section 310, it supports an inference that § 1018 addresses only state liability laws.

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[20] S 686, section 310, provided: "Nothing in this title shall be construed or interpreted as changing, diminishing, or preempting in any way the authority of a State, or any political subdivision thereof, to regulate oil tankers or to provide for oil spill liability or contingency response planning and activities in State waters." S 686, § 310, 101st Cong., 1st Sess. (Aug. 11, 1989).

The more logical inference, however, is that section 310 was eliminated because it was duplicative of section 106. Section 106 was a broad statement of intent not to preempt state law. The report from the Environment and Public Works Committee considering S 686 states:

> "Section 106 of the reported bill explicitly preserves the authority of *any State to impose its own requirements or standards with respect to discharges of oil within such State*. . . .
>
> . . . .
>
> Preemption has been discussed by the members of the Committee more than any other single issue. S. 686 does not embrace any preemption of State oil spill liability laws, State oil spill funds, or State fees, taxes, or penalties used to contribute to such funds. *The long-standing policy in environmental laws of not preempting State authority and recognizing the rights of States to determine for themselves the best way in which to protect their citizens, is clearly affirmed in S. 686.*" S. Rep. No. 101-94, 101st Cong., 1st Sess., pp. 17-18 (1989) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 739-740.

When the conference committee blended the provisions of S 686 and HR 1465 to create the Oil Pollution Act, it incorporated verbatim section 106(e) of S 686, by renumbering the subsection as § 1018(c). The Senate Report on S 686 had previously explained that it intended section 106(e) to confirm the absence of any significant intent to preempt:

> "This subsection reinforces the position *stated clearly elsewhere that no aspect of state oil spill programs is preempted*, including the authority to impose additional requirements or penalties." S. Rep. No. 101-94, 101st Cong., 1st Sess., p. 18 (1989) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 740.

In the final act, the broad sweep of section 106(e), meant that there was no need to repeat the same language that had been in section 310.

7. Intertanko argues next, again relying in part on Judge Graber, that § 1018 is limited to liability matters because the Oil Pollution Act repealed and adopted other provisions dealing with preemption. Intertanko Br. at 44-46. First, Intertanko points out that the Oil Pollution Act repealed liability fund provisions in the Trans-Alaska Pipeline Authorization Act, 46 U.S.C. § 1653(c)(9); the Outer Continental Shelf Lands Act, 43 U.S.C. § 1820(c); and the Deepwater Port Act, 33 U.S.C. § 1517(k)(1). Intertanko argues that this establishes that § 1018 is simply a substitute for those provisions. This conclusion does not follow. We agree that § 1018 does not preempt state laws on liability and that the Oil Pollution Act replaced other liability funds. The plain language of § 1018, however, cannot support a cramped interpretation that it only addresses liability.

Intertanko also points out that the express non-preemptive provision of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1321(o)(2), was amended by the Oil Pollution Act to add the phrase "or with respect to any removal activities related to such discharge". OPA 90 § 4202(c). Intertanko argues this amendment would be unnecessary if § 1018 applied broadly. Section § 4202 amended parts of the FWPCA to set up a national response and planning system. The amendment to § 1321(o)(2) merely makes the FWPCA consistent with § 1018. Again, this fails to demonstrate that § 1018 is narrow or limited.[21]

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[21] Intertanko points to two other sections of the Oil Pollution Act that have non-preemptive language and argues that they would be unnecessary if § 1018 applies broadly. These sections are tailored to address fundamentally different issues. Section 5002, the Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Act of 1990, sets up a local citizens' council (§ 5002(d)(1)) "to advise, monitor and make recommendations to oil terminal and tanker operators and governmental

E. Washington Laws Are Not Preempted By International Treaties

In its field preemption argument, the federal government relies on international treaties as a purpose of Congress. As a separate argument, however, the government makes the statement that treaties addressing tankers "independently" have preemptive force. U.S. Br. at 28. Intertanko cites to four conventions affecting shipping to argue that treaties fully occupy a "domain" to the exclusion of other lawmaking. Intertanko Br. at 30. Petitioners' reliance on these international treaties is not well taken.

2. The four treaties addressed by Intertanko and the government provide broad goals, which do not create self-executing rights. Article I(b) of the International Convention for the Safety of Life at Sea, 1974 (SOLAS) provides that the contracting governments "undertake to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary to give the present Convention full and complete effect". The Articles of Protocol of 1978, amending SOLAS, uses the same formulation – that the parties "undertake to give effect to the provisions". Protocal of 1978, Article I. On its face, the standards and provisions of SOLAS do not independently preempt state laws.

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officials" in Prince William Sound and Cook Inlet, Alaska. H.R. Conf. Rep. No. 101-380, 101st Cong., 2d Sess., p. 156 (1990), *reprinted in* 1990 U.S.C.C.A.N. 835. The savings clause in section 5002(n)(1) simply makes it clear that this unique entity "is not intended to affect the authority of the state of Alaska or the federal government with respect to the operation of oil tanker and terminal facilities". *Id.*. Title VIII, the Trans-Alaska Pipeline System Reform Act of 1990 (§ 8001), deals with issues pertaining to the Trans-Alaska Pipeline System. Section 8202 authorizes a civil penalty for discharges in transit from oil fields to the pipeline and during transportation through the pipeline or handling at the terminal facilities. Section 8202(e) provides that states are not preempted from imposing additional liability. Even if, under Intertanko's reading, § 1018 is limited to liability, it was not necessary to enact section 8202(c). Congress simply made section 8202 consistent with § 1018. It did not imply that § 1018 intends something different than its broad language.

Petitioners cite to the International Safety Management Code (ISM), adopted as Chapter IX of SOLAS, which addresses broad subjects such as "management" and "operation" of ships. The ISM illustrates the limited effect of the conventions. The ISM Code recites broad aspirations for management and operation of ships. *See* ISM Code 2.1 ("The Company *should* establish a safety and environmental-protection policy") (emphasis added). The ISM leaves extensive room for state spill prevention planning that ensures preparation for the needs and risks presented by that state's waters, acknowledging "ships operate under a wide range of different conditions" and the ISM provides only "general principles and objectives". ISM Code Preamble ¶ 4.

The International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978 (STCW) (as amended through 1995) takes the same form as SOLAS. Article I of that Convention provides that the STCW does not contain self-executing laws or standards, but that the parties must "undertake to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary". The STCW provisions are written in terms of each country using its own laws to implement the minimum requirements. The same description applies to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL). *See* MARPOL Article I(1) ("Parties . . . undertake to give effect to the provisions of the present Convention").

3. International treaties may include specific provisions that are arguably mandatory or create rights that independently preempt Washington law. For example, Article X of the STCW provides that "[s]hips . . . are subject, while in the ports of a Party, to control by officers duly authorized by that Party to verify that all seafarers serving on board who are required to be certificated by the Convention are so certificated". This provision is not material to this case. Washington has disclaimed power to "control ships", and the record fails to

show that Washington has attempted to control ships to verify certificates in violation of Article X of the STCW. Wash. Admin. Code § 317-21-550(1). Washington directs its regulation at owners and operators to avoid conflict with the operative provisions of international law. Accordingly, this case does not present any situations where there is direct conflict between Washington law and a treaty right. *See also* Argument, Part G *infra* p. 37-48.[22]

4. In essence, petitioners are asking this Court to conclude that SOLAS and the ISM, the STCW, and MARPOL command each signatory nation to abandon federalist forms of government. The Note Verbale from Denmark, cited by the federal government, complains that a federalist form of government creates a *potential* for state laws that could be in conflict with federal laws. Intertanko App. at 354a. Neither the Note Verbal nor the amicus brief of the European Nations identifies any treaty provision that Washington State has violated.

These arguments indirectly confirm that international conventions such as SOLAS, the STCW, and MARPOL are made with the knowledge that the government has a federalist form of government. *See Wardair Canada, Inc. v. Florida Dep't of Rev.*, 477 U.S. 1, 12 (1986) (holding that agreement between two federalist nations is interpreted to reflect knowledge that the U.S. has both federal and state taxes); *Pink*, 315 U.S. at 230 (international treaties shall be construed to preserve state powers). As explained in *Wardair Canada*, the

[22] In footnotes, the government asks this Court to address whether Washington has violated a vessel management agreement with Canada or interfered with innocent passage. U.S. Br. at nn.22 & 23. Neither alleged conflict was presented to the district court. No record exists beyond the bare assertions in briefing that a conflict could exist. Moreover, each assertion seems focused on the mistaken assumption that Washington has some power or intent to control ships during passage. In the absence of an actual case or controversy and a ruling by the court of appeals, these issues are not properly before this Court or fairly subsumed in the question presented.

constitutional power of the federal government to speak with one voice on foreign affairs does not mean that it must "speak with any particular voice" and preempt state powers. *Wardair Canada*, 477 U.S. at 13.

5. The petitioners' related argument that these treaties reflect international uniformity in tanker design, construction, maintenance, and operation also falls far short of showing that Congress has left no room for Washington's oil spill prevention planning. The government describes how these international agreements cover limited matters and culminate in flag states issuing certificates that ships comply with minimal international standards. The certification process is not itself a uniform law, because "flags of convenience" maintain an open register allowing any vessel to be registered under the country's flag, even though it has no connection with the country. In many open registers, the flag state does not have the capability of supervising the safety of ships and, since a ship's registration can be transferred, shipowners can shop around for registers that have the lowest standards of enforcement at the lowest cost.[23] The limits on international uniformity were confirmed again in 1996 by the Organisation for Economic Co-operation and Development, which concluded that shipping is a free market that allows shipowners to determine vessel operating policy and avoid compliance with internationally agreed rules and regulations.[24]

6. Allowing Washington to apply an important environmental protection law to operations and actions of an oil tanker when it approaches and enters Washington does not impair a uniform international system. SOLAS, the STCW, and MARPOL do not substitute for the laws of the

[23] Lord Donaldson, London:HMSO, *Safer Ships, Cleaner Seas* ¶ 6.20 (May 1994); JA at 314-15.

[24] Directorate for Science, Technology and Industry Maritime Transport Committee, Organisation for Economic Co-operation and Development, Paris, *Non-Observance Of International Rules And Standards: Competitive Advantages* at 3 (January 1996).

implementing countries and do not address operational needs particular to the waters of the United States. Based on its actions in adopting the Oil Pollution Act and prior laws, it is inappropriate to impugn Congress with an intent that these international conventions are the solitary means of protecting each state's marine environment. Congress has never made international uniformity and convenience of the tanker industry a goal that displaces state power to enact laws tailored to preventing oil spills in state waters.

F. Title I Of The Ports and Waterways Safety Act Does Not Require Preemption Of State Police Powers

1. In addition to arguments that states are impliedly preempted on broad fields, petitioners argue that Washington law is preempted due to conflict. Conflict preemption exists when "it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'". *English*, 496 U.S. at 79 (citation omitted) (quoting *Hines*, 312 U.S. at 67). Physical impossibility, however, has not been asserted as a basis for conflict preemption. JA at 87. Moreover, the rulings that rejected Intertanko's commerce clause arguments confirm that it is not impracticable to comply with plan requirements. Pet. App. at 32a-33a, 81a-85a. Indeed, many Intertanko members have complied. JA at 119. Petitioners, however, make two further arguments under the label of conflict preemption.[25]

2. Petitioners argue, again, that the full purposes and objectives of Congress include creating a singular set of convenient regulations for the tanker industry and that Washington's law presents an obstacle to this purpose. This argument is indistinguishable from petitioners' arguments that

[25] Note 22, above, addresses the third conflict argument, made by the federal government, claiming potential conflict with a United States/Canada vessel traffic agreement or with doctrines regarding innocent passage.

fields are impliedly preempted, addressed above. Furthermore, the Court of Appeals opinion on this case provides a persuasive explanation that Washington's law does not, on its face, present any obstacle to the full purposes of Congress. Congress has never endorsed simplistic devotion to international uniformity to the exclusion of state police powers tailored to oil spill prevention programs in local waters. Pet. App. at 17a-18a; *see* Argument, Part E *supra* p. 30-34.

3. The government points its conflict preemption argument at the individual requirements of the Washington law. The government does not focus on actual conflicts. Instead, it contends that Title I of the PWSA requires preemption of any state law if it addresses the same subject matter as a federal regulation. U.S. Br. at 27-28. This argument is based on 33 U.S.C. § 1225(b), which provides that: "Nothing contained in this section, with respect to structures, prohibits a state or political subdivision from prescribing higher safety equipment requirements or safety standards than those prescribed by Regulations hereunder." The government relies upon *Ray* to make this argument.

Ray invalidated Washington's prohibition on tankers of 125,000 DWT in port, because the Coast Guard had adopted a rule that permitted these so called supertankers on Puget Sound. *Ray*, 435 U.S. at 174-75.[26] The Court rejected the state's argument that Title I of the PWSA applied only to equipment. *Ray*, 435 U.S. at 174. The Court concluded that a size limit was a vessel safety standard and held the state could not impose higher safety standards for *vessels*. The legislative history of this provision establishes that Congress was concerned with vessel standards, not vessel operations. According to the House Report:.

> "The Coast Guard witness said that it was their intention that higher vessel equipment regulations and

[26] The Court also described this provision as an invalid design requirement. *Ray*, 435 U.S. at 175-76.

standards by States should apply to structures only and not to vessels. He agreed that the language of H.R. 17830 was not clear in this regard and that we should put some clarifying language in the section.

Your Committee adopted the suggested language since it will make clear the intent mentioned above." H.R. Report No. 92-563, 92d Cong., 1st Sess., p. 15 (1971).

While a Coast Guard vessel safety standard for Puget Sound will preempt a higher state vessel standard, this same reasoning does not extend to the state operational requirements at issue in this case.

This is confirmed by the holding in *Ray* with regard to tug escorts, which do not constitute a vessel safety standard. The Court upheld Washington's requirement for a tug escort, but it did not conclude that adoption of *any* Coast Guard rule on that subject would necessarily preempt the tug escort requirement. *Ray*, 435 U.S. at 172 ("It may be that rules will be forthcoming that will pre-empt the State's present tug-escort rule, but until that occurs, the State's requirement need not give way under the Supremacy Clause."). At that time, the federal register notice on the subject of proposed tug assistance rules stated only that such rules were "to be developed". 41 Fed. Reg. 18770 (1976). The Court's own citation to this notice contradicts the interpretation that any federal rule will preempt an entire subject matter.

4. Moreover, for a rule to have preemptive effect, it must be a safety standard for Puget Sound. As this Court said in *Ray*, the "relevant [preemption] inquiry under Title I [of the PWSA] is . . . whether the Secretary has either promulgated his own . . . requirement *for Puget Sound* tanker navigation or has decided that no such requirement should be imposed at all". *Ray*, 435 U.S. at 171-72. If federal rules addressed the "peculiarities of local waters that call for special precautionary measures" (*id.* at 171), then a court could examine whether state law was in conflict with such rules. Thus, Washington's

supertanker prohibition was in direct conflict with a "*local* navigation rule" that determined "in what circumstances tanker size is to limit *navigation in Puget Sound*". *Id.* at 174-75 (emphasis added).

The federal government's Title I preemption claim is based on general Coast Guard Rules that are not specific to Puget Sound. For example, Washington requires tankers to record their position every fifteen minutes while in state waters. The government claims this requirement is preempted under Title I of the PWSA, because the Coast Guard decided not to adopt this requirement. U.S. Br. at 41 n.18. In fact, the Coast Guard never considered the application of this rule to Puget Sound. The proposed rule would have applied to "the navigable waters of the United States, except the Panama Canal and St. Lawrence Seaway". 41 Fed. Reg. 18766 (1976). The Coast Guard decided not to adopt the rule because it "would not be practicable in all navigable waters". 42 Fed. Reg. 5957 (1977). The Coast Guard has not concluded that the fixed interval requirement is not practicable in Puget Sound. In is an important safety measure given the difficulty of navigation.

5. Washington's interpretation of *Ray* is consistent with this Court's jurisprudence on conflict preemption. Allowing preemption when a general Coast Guard rule coincides with the subject matter of a state law creates a presumption *against* state police powers. It leads to preemption when there has been no analysis of whether the state requirement presents a significant obstacle to a federal purpose or a physical impossibility.

G. Washington's Requirements Do Not Conflict With United States Or International Requirements

The federal government seeks to show preemption both by a recitation of examples (U.S. Br. at 33-41) and by using a chart attached as an appendix that lists laws by broad category. In the examples, however, the government often applies its Title II field preemption argument, by attaching labels and citing to 46 U.S.C. § 3703. The government also cites

33 U.S.C. § 1223, to apply its contention that any regulation under Title I of the PWSA carries automatic preemption. Both of these arguments wrongly use broad or mechanical preemption concepts. The above arguments have already addressed the error of such preemption analysis.

The government's examples allow Washington to demonstrate that there is no conflict between state and federal requirements, or with international standards. Part 2 in this section shows there is no conflict presented by Washington's requirements for conduct in or near Washington waters. Part 3 reviews the Washington requirements that are reasonable spill prevention measures mirroring the federal law or international standards. Part 4 reviews the Washington requirements that are slightly different, but present no meaningful conflict.

1. The Laws Listed In The Government's Chart Are Often Unrelated And Do Not Show Conflict

As a threshold matter, the government's chart creates a misimpression. The government characterizes the chart as "a comprehensive comparison of the state BAP rules to the federal and international standards". U.S. Br. at 34 n.14. The apparent implication is that this opaque list of laws and standards implies that there is no room for state prevention plans, or that conflict must be in the air. Comprehensiveness and complexity are hallmarks of regulatory laws and do not, standing alone, justify an inference of preemption. *E.g.*, *Hillsborough Cy.*, 471 U.S. at 716-17.

As shown by the following examples, the chart should not be used to infer that conflict is in the air. Many of the laws listed by the chart have little bearing on Washington's spill prevention plans and show no hint of conflict.

Example 1 **– Security Rounds – Wash. Admin. Code § 317-21-200(4)**

A spill prevention plan requires the company to describe how its master will designate places on the vessel to

be periodically examined for safety and spill hazards such as defective machinery, hull integrity, or crew activities. Security rounds occur while under power, anchored, or docked in Washington waters. JA at 101. The government's chart lists the following federal laws and international treaties: 46 C.F.R. §§ 35.05-15, 15.1109; 33 C.F.R. §§ 155.810, 164.13(b); STCW A-VIII/2 (part 4-3, 4-4), (51.4)(anchored); U.S. Br. at 4a.

The four regulations have little or no relevance to security rounds and certainly show no conflict:

- 46 C.F.R. § 15-1109 provides that "[e]ach master of a vessel that operates beyond the Boundary Line shall ensure observance of the principles concerning watchkeeping set out in STCW Regulation VIII/2 and section A-VIII/2 of the STCW Code."
- 46 C.F.R. § 35.05-15(a) provides that "[a]t least one member of the crew of a manned tank vessel shall be on board at all times except when the vessel is gas free or is moored at a dock or terminal at which watchman service is provided."
- 33 C.F.R. § 155.810 provides that "[t]he vessel operator of each tank vessel that contains more oil than the normal clingage and unpumpable bilge or sump residues in any cargo tank shall maintain surveillance of that vessel by using a person who is responsible for the security of the vessel and for keeping unauthorized persons off the vessel."
- 33 C.F.R. § 164.13(b) provides that "[e]ach tanker must have an engineering watch capable of monitoring the propulsion system, communicating with the bridge and implementing manual control measures immediately when necessary. The watch must be physically present in the machinery spaces or in the main control space and must consist of at least a licensed engineer."

The international standards on the list include unrelated issues. The arguably relevant sections are not inconsistent with Washington's requirements, although not specific to Puget Sound. STCW A-VIII/2 (51.4) provides: "While at anchor, the officer in charge of the navigational watch shall . . . ensure that inspection rounds of the ship are made periodically." STCW A-VIII (part 4) deals with principles of watchkeeping while in port. Part 4-3 governs performing the deck watch. These principles include making "rounds to inspect the ship at appropriate intervals". STCW A-VIII (part 4-3) (102.1). Part 4-4 governs performing the engineering watch, which is unrelated.

Example 2* – Standby Generator – *Wash. Admin. Code § 317-21-210(1)

A spill prevention plan requires tankers *without* automatic switching gear for stand-by generators to turn on their stand-by generators to be available to assume the electrical load while underway in Washington waters. The government's chart lists the following federal laws and international treaties: 46 U.S.C. § 3703; 33 C.F.R. § 164.25(a)(3); 46 C.F.R. §§ Part 112, n.b, 112.25-3, 25-5, 25-10; SOLAS ch. II-1, Reg. 44; U.S. Br. at 7a.

First, the standby generator aspect of a Washington spill prevention plan illustrates the illogic of the government's field preemption argument that the labels in 46 U.S.C. § 3703(a) ("design, construction, alteration, repair, maintenance, operations, equipping, personnel qualification, and manning") can be used to infer Congressional intent to preempt. Turning on a standby generator addresses the danger of losing power in confined waters. It is an operational necessity peculiar to Washington and analogous to local pilotage. It is not design and construction.

Furthermore, no conflict is shown by the regulations or unrelated international standards:

- 33 C.F.R. § 164.25(a) provides that equipment be tested no more than twelve hours before entering the waters of the United States or getting underway, including a "[s]tandby or emergency generator, for as long as necessary to show proper functioning, including steady state temperature and pressure readings." *Id.* at (a)(3).

- 46 C.F.R. §§ Part 112, 112.25-3, 25-5, 25-10 deals with the normal source for emergency loads. It is an equipment requirement. 46 C.F.R. § 112.25-3(a) ("The normal source for emergency loads must be the ship's service generating plant."). 46 C.F.R. § 112.25-5 provides for a transfer to a "final emergency power source".

- SOLAS ch. II-1, Reg. 44 sets out technical specification for starting emergency generating sets and does not address whether a standby generator should be ready in the narrow confines of Puget Sound. SOLAS ch. II-1, Reg. 4(1) ("Emergency generating sets shall be capable of being readily started in their cold condition at a temperature of [zero degrees Celsius].").

Example 3 - STCW Requirements For Crew Certification

The government's chart asserts that Washington's operational requirements for local waters[27] somehow implicate crew certification requirements of the STCW, listing STCW A-II/1, A-II/2, A-II/3, and A-II/4. As an example, Wash. Admin. Code § 317-21-205(3) requires the master to have a schedule for comparing the steering gyrocompass with the magnetic compass, because of the risk of accident from an erroneous compass heading. JA at 106. The government's chart lists STCW A-II/2 (p. 43). U.S. Br. at 6a.

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[27] Wash. Admin. Code §§ 317-21-200(1)(b), -205(2), (3), -215(1), -220(1)-(3). U.S. Br. at 2a, 5a-6a, 8a-9a.

Chapter II of the STCW Code establishes standards of seafarer certification. STCW A-II/2 identifies "[m]andatory minimum requirements for certification of masters and chief mates on ships of 500 gross tonnage or more." A candidate must demonstrate competence in certain areas, including how to "[d]etermine and allow for compass errors." STCW A-II/2 (page 43).

The certification of a master and chief mate for using compasses is not implicated by a spill prevention plan with a schedule for checking compasses in Puget Sound. This is like comparing the certified competence of a master to run the ship, with the state's requirement that a ship use a local pilot in Puget Sound. Sections A-II/1, A-II/3, and A-II/4 of the STCW set out other mandatory minimum requirements for certification that simply ensure competence, allowing these persons to be able to comply with particular needs for operating in Washington waters.

2. Some Washington Operational Requirements Prescribe Conduct Directly Necessitated By Local Conditions

A number of Washington's spill prevention requirements focus on conduct that should occur in or near Washington waters. No conflict is presented by these requirements.

Operating In Restricted Visibility – Wash. Admin. Code § 317-21-200(1)(a)

Washington requires three licensed deck officers, one of whom may be a pilot, on the bridge during restricted visibility. Washington requires this sensible step to avoid a collision or grounding in the narrow and congested waters of the Strait of Juan de Fuca and Puget Sound. JA at 99. In addition to its field preemption theory, the government argues that this requirement is preempted because of a Coast Guard rule requiring a minimum of two officers or because of a conflict with rest requirements of federal law.

The general Coast Guard requirement of two licensed officers on the bridge presents no conflict, nor is there conflict with the international goal of ensuring that watch officers obtain at least ten hours of rest in a twenty-four-hour period. The alleged conflict is based on the four-hour travel time between buoy J and pilotage waters when the third deck officer must come from the ship's crew. U.S. Br. at 37-38. Nothing in the record supports the speculation that additional crew would have to be flown to Washington. Ten hours of rest allows a deck officer to work fourteen hours a day, if needed. Thus, even after serving two four-hour watches, a deck officer could still work an additional six hours, which could include the four hours between buoy J and pilotage waters. In any event, the STCW provides an exception for overriding operational conditions, such as restricted visability. STCW A-VIII/1.3 ("The requirements for rest periods laid down in paragraphs 1 and 2 need not be maintained in the case of an emergency or drill or *in other overriding operational conditions*.") (emphasis added). This can include restricted visability.

Prearrival Tests And Inspections – Wash. Admin. Code § 317-21-215

A Washington plan requires tankers to make certain tests and inspections twelve hours or less before entering state waters. The government claims this requirement is preempted by Title II of the PWSA, because they label it an equipment requirement. U.S. Br. at 40. It is not an equipment requirement. It is an operational requirement, directly related to safe entrance into Washington. JA at 110. Except for its field preemption theory, the federal government shows no inconsistency with federal and international standards. Conflict preemption is not applicable.

Advance Notice Of Entry – Wash. Admin. Code. § 317-21-540

Washington requires tankers to give advance notice of entry into state waters. The government argues that this requirement is preempted under Title I of the PWSA,

because the Coast Guard has a rule on advance notice of entry. U.S. Br. at 38-9. Washington accepts the same notice of entry that the Coast Guard requires. In fact, the state and the Coast Guard share this information under a Memorandum of Agreement they entered into in 1995. JA at 266-70. No conflict is presented by providing notice to a state in coordination with an identical federal requirement. *Zook*, 336 U.S. at 729-30.

3. Spill Prevention Requirements That Mirror Federal And International Requirements

Some of Washington's safety requirements for prevention plans affect Washington waters but are not performed exclusively in Washington. Many of these requirements, however, are the same as federal and international standards and create no conflicts.

Emergency Procedures – Wash. Admin. Code § 317-21-220

A Washington plan requires the master of the vessel to post "station bills" for the crew stating crew assignments for various emergencies, such as fire or oil spills. The master must also establish written procedures for emergencies, such as collision, loss of propulsion, and loss of steering. The government argues that this operational requirement is a proficiency requirement and that there is a need for uniformity in an emergency. U.S. Br. at 40. The government misunderstands the requirement. It requires the company to post procedures and have written policies. JA at 110-11. It is consistent with federal and international standards. ISM Code 8.1-8.2 (8.1 – "The company should establish procedures to identify, describe and respond to potential emergency shipboard situations." 8.2 – "The company should establish programmes for drills and exercises to prepare for emergency actions."). Any company that complies with the ISM Code should have a plan that meets Washington's requirement.

Personnel Policies-Training – Wash. Admin. Code § 317-21-230

A Washington plan requires a tanker company to explain how it will provide training for its crew. The government argues that this requirement imposes a personnel qualification on the certificated seafarers or requires training beyond that necessary to get a license or certification. U.S. Br. at 35. The government misunderstands this requirement. Washington requires the company to explain how it will provide necessary training. Washington does not evaluate crew licenses or certificates.

The petitions speculate without basis that a tanker would have to fly a special crew to Washington. The training that the company describes need only be consistent with federal and international requirements. The ISM Code requires companies to "establish and maintain procedures for identifying any training which may be required" and to "ensure that such training is provided for all personnel concerned". ISM Code 6.5. It is analogous[28] to the training required under the STCW. *See* STCW A-II/2 (minimum standard of competence for masters and chief mates on ships of 500 gross tonnage or more); A-III/2 (minimum standard of competence for chief engineer officers and second engineer officers on ships powered by main propulsion machinery of 3,000 kW propulsion power or more); A-II/1 (minimum standard of competence for officers in charge of a navigational watch on ships of 500 gross tonnage or more); A-III/1 (minimum standard of competence for officers in charge of an engineering watch in a manned engine-room or designated duty engineers

[28] When Wash. Admin. Code § 317-21-230 was adopted in 1995, the state did require a company to provide training beyond that necessary to obtain a seafarer license. However, that is no longer true. When the ISM Code, authorized by SOLAS Chapter. IX, went into effect in 1998 and the 1995 Amendment to the STCW was implemented by the federal government, the Washington requirements and the international requirements converged.

in a periodically unmanned engine-room); A-VI/1 (mandatory minimum requirements for familiarization and basic safety training and instruction for all seafarers); A-VIII/2, Part III (Watchkeeping at sea). Washington simply intends that each company confirm its training in a plan that Washington can use to ensure compliance.

Language – Wash. Admin. Code § 317-21-250

A Washington plan requires all licensed deck officers and the vessel's "designated person in charge", 33 C.F.R. § 155.700, to communicate in English and a language understood by subordinate officers and unlicensed crew. The government argues that Washington's "requires all licensed deck officers to speak the language of the entire unlicensed crew". U.S. Br. at 36. There is nothing in the record to support this claim. The government misunderstands the Washington requirement. With regard to English, needed for external communication, Washington's requirement is the same as STCW Table A-II/1 (English language) (page 34). JA at 132. With regard to the crew, Washington requires "a language understood and spoken by subordinate officers and the unlicensed crew". Wash. Admin. Code § 317-21-250. The government cites no difference in federal law or international standards.

Management – Wash. Admin. Code § 317-21-260

A Washington plan requires a company to describe active management practices, policies, and safety procedures. The government argues that this is preempted under Title II, because they label it a personnel qualification. U.S. Br at 36-37. It is not a personnel qualification. It is a requirement directed to *the company* operating the vessel. It is consistent with the ISM Code: "A document of compliance should be issued for every Company complying with the requirements of the ISM Code by the Administration[.]" ISM Code 13.2. Washington accepts ISM certification obtained by companies. Once again, Washington requires no different conduct than required by federal law or international standards.

4. Washington Requirements That Differ From Federal Requirements Cause No Conflict

Some of Washington's requirements for prevention plans differ from the federal requirements. Even with regard to these requirements, the federal government has not demonstrated any meaningful conflict.

Event Reporting – Wash. Admin. Code § 317-21-130

Under a Washington plan, the owner or operator shall report events, such as collisions, for each vessel covered by the plan. This requirement is slightly different than the federal requirement. Washington requires reports of a near-miss and a report of corrective action. This area also is subject to the Memorandum of Agreement between Washington and the Coast Guard, in which the parties agree to share information about events such as collisions. JA at 270. The mere existence of an analogous federal requirement does not explain why the Washington requirement creates an irreconcilable conflict.

Illicit Drug And Alcohol Testing – Wash. Admin. Code § 317-21-235

A Washington plan requires the company to have minimal drug and alcohol testing and prohibits consumption in Washington. The most important difference with the Coast Guard's drug and alcohol rule is that Washington applies its requirement to companies with foreign flagged tankers while the federal requirements apply only to United States flagged vessels. The only reason advanced by the government to support a claim of conflict is that foreign governments have informed the federal government that their laws might not allow the drug and alcohol testing required by Washington. U.S. Br. at 34. The foreign governments with this concern are misinformed. The record in this case establishes that Washington waives the testing requirement if compliance would conflict with other laws governing the crew on a vessel coming to Washington. JA at 256. The government does not explain why including foreign flag vessels in this Washington

requirement is an obstacle to achieving the purpose of Congress. For example, the government does not appear to claim that safety will be enhanced by not testing foreign flag crews.[29]

H. Express Statements Of Preemption By The Coast Guard, Standing Alone, Do Not Preempt Aspects Of Washington's Oil Spill Prevention Planning

Intertanko and the federal government contended that the Coast Guard's bare declarations of an intent to preempt amounts to "express preemption". Intertanko Br. at 33; U.S. Br. at 44. As this Court emphasized in *City of New York v. Federal Communications Commission*, 486 U.S. 57, 63 (1988), Congressional intent to preempt state law may arise through an agency "acting within the scope of its congressionally delegated authority", but in such cases

> "the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. *The statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances the agency may* determine that its authority is exclusive[.]" *Id.* at 64 (emphasis added).

[29] The federal government suggests that Washington's testing might violate the Fourth Amendment to the Constitution and that federal tests are limited to crew in "safety-sensitive positions". U.S. Br. at 34 The federal drug testing applies broadly to crew members, including those who occupy "a position, or perform the duties and functions of a position, required by the vessel's Certificate of Inspection" or who perform "duties and functions of patrolmen or watchmen required by this chapter". 46 C.F.R. § 16.230(a)(1), (2).

The opinion emphasizes that the determination of whether an agency may preempt state and local regulation follows from the rule that

> "'an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.' *Louisiana Public Service Comm'n*, 476 U.S., at 374". *Id.* at 66.

The Court of Appeals properly concluded that Intertanko and the government had not shown preemption based solely on simple declarations by the Coast Guard. As noted in *City of New York*, an agency's choice to preempt state law is not valid if "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned". *Id.* at 64 (quoting *United States v. Shimer*, 367 U.S. 374 (1961)). Here, the savings clauses of the Oil Pollution Act and the lack of Congressional intent to preempt Washington from the fields associated with oil spill prevention planning and inspections showed that the Coast Guard needed to do more than simply declare a zone of preemption. In light of these Congressional intentions, the Coast Guard needed to demonstrate that its preemption reflected a precisely described zone of actual conflicts or an area of exclusivity that corresponded with Congress' intent to broadly include state powers to protect state waters from oil spills.

The inability of the Coast Guard to simply declare zones of federal preemption does not limit its ability to fulfill its statutory obligations. The Court of Appeals opinion casts no doubt on the ability of the Coast Guard to displace a state law that actually conflicts with a Coast Guard rule. Washington has never denied that preemption must follow

from a proper showing of conflict or frustration of purpose with a lawfully enacted Coast Guard rule.

CONCLUSION

The judgement of the Court of Appeals should be affirmed.

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Nos. 98-1701 & 98-1706

IN THE

Supreme Court of the United States

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

-and-

UNITED STATES OF AMERICA,

Petitioner,

v.

GARY LOCKE, Governor of the State of Washington, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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> *"Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use." Gibbons v. Ogden*, 9 Wheaton (22 U.S.) 1, 278 (1824).

I. THE CONSTITUTIONAL ISSUES BEFORE THE COURT ARE CONFINED TO THE VALIDITY OF WASHINGTON STATE REGULATION OF THE PRIMARY CONDUCT OF TANK VESSELS SERVING THE INTERSTATE AND FOREIGN COMMERCE OF THE UNITED STATES IN SUBJECT MATTERS ADDRESSING THE OPERATIONS, EQUIPMENT, MAINTENANCE, PERSONNEL QUALIFICATIONS, AND MANNING OF THOSE VESSELS.

Petitioners Intertanko and the United States of America here seek reversal of a Ninth Circuit Court of Appeals decision authorized entry by a state government into the previously exclusive federal domain of tank vessel "design, construction, alteration, maintenance, operation, equipping, personnel qualification, and manning." Ports and Waterways Safety Act ("PWSA"), as codified and amended at 46 U.S.C. 3703(a).[1] *See* Pet. App., App. A, at 1a. The questions presented, while of profound constitutional import, are far narrower than suggested by the response briefs of the State of Washington ("the State") and its supporters.

---

1. Intertanko's references to the PWSA, unless otherwise indicated, include amendments or additions to that Act as codified at Chapter 37 of Title 46 of the United States Code, including amendments effected by the Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471 (1978).

The State and its supporters offer stark dichotomies that do not exist.[2] The alternatives presented the Court in this litigation are not a choice between effective regulation of tank vessel safety and the absence of such regulation. This litigation, accurately presented, does not compel the Court to evaluate which of two regulatory regimes it deems most effective at meeting the universally valued policy objective of protecting the marine environment through promoting the safe operations

2. Amicus States and the Prince William Sound Regional Citizens' Advisory Council ("RCAC") express concern that the field preemption positions advocated by Intertanko and the United States would inhibit or prevent States and other local entities from asserting rights to enforce federal standards, from incorporating federal regulations into state law and prevent States from imposing additional standards in areas regulated by the federal government. *See e.g.*, States' *Amicus* Br. at 11–12 and RCAC Brief at 11. The presence on the brief of non-littoral states such as Utah and Nevada suggests that this concern is generic, and not confined to the PWSA subject matters raised here. Intertanko is not advocating a ban on cooperative federal/state programs. The validity of such programs depends on the coverage of the underlying federal statute and the intent of Congress with regard to state action. Many of the examples cited by the Amicus States and the RCAC are clearly matters affecting cooperation at the junction of state and federal regulatory regimes, as, for example, where state-regulated shore-side terminals meet federally regulated vessels at the terminal facility loading dock. The California programs described at nn. 8, 11-14 appear to fall within this quite distinct category that is not directly implicated by Intertanko's argument that States may not regulate within Title II PWSA subject matters of tank vessel design, construction, alteration, repair, maintenance, equipping, personnel qualifications and manning. States *Amicus* Br. at 6 and 13. Nonetheless, to be clear, where the subject matters of state regulation fall within the field defined by these elements of section 3703(a) of Title 46 U.S.C., it is indeed Intertanko's position that duplicative regulation by the States, even where purporting to adopt the same standards, is constitutionally forbidden. State or local programs that affect vessel secondary activity in matters outside the coverage of preemptive federal statutes would have to be evaluated on conflict preemption principles. That circumstance is not presented here.

of tank vessels.[3] The question is, rather, whether and by what authority a pervasive, comprehensive, technically complex federal vessel safety and marine environmental protection regime governing the primary on-board conduct of U.S. and foreign vessels can be displaced by unilateral local action when those vessels are operating in or destined to operate in that portion of the navigable waters of the United States that are within three miles of shoreline of the State of Washington.[4] Put

3. Respondent and *amici* briefs invite an assumption that the State of Washington has constructed a better marine safety and environmental safety regime than has the federal government. Intertanko views the federal regime, and the international controls it subsumes, to be far superior to disparate state regimes for protecting ships, crews and the marine environment. This divergence of views is one best checked at the door of the federal judiciary and politely acknowledged to be the sort of matter on which reasonable stewards of the marine environment can, in all good faith, differ. The questions presented to the federal courts by the State of Washington's efforts to impose a vessel safety regime that departs the federal system are ones concerning constitutional authority at different levels of government within the federal system. The courts and the parties are poorly served if the judiciary is importuned to render fundamental constitutional decisions based on federal judges' subjective views of the merits of competing regulatory regimes.

4. The State obliquely acknowledges in its brief that many of the challenged Best Achievable Protection ("BAP") regulations apply to owners and operators outside the State of Washington: "A number of Washington's requirements are performed in or near Washington waters." State Br. at 6 and n.7; and "A second category of spill prevention requirements protect Washington waters, but do not necessarily involve operations performed exclusively in Washington waters." State Br. at 7-8 and n.8. Intertanko has contended from the district court complaint onward that many of the challenged BAP regulations are invalid because of their extraterritorial application to vessels and persons. The State in these quoted formulations appears to acknowledge this objection. As noted in affidavits submitted to the district court, vessel owners cannot segregate vessels and crews for Washington State operations. Frequently vessels commence voyages with only general notions of the ultimate destination of a vessel. In any event, vessels must be configured to trade over a wide range of ports and regions. Thus disparate requirements cumulatively burden the operations of the vessel.

more simply, the questions presented by the United States and by Intertanko in their Briefs on the merits can be fairly condensed to two words: "Who decides?" Is the federal judgment that a vessel is safe to navigate the waters of the United States "supreme" in the State of Washington? Intertanko submits that the answer here must be the answer of *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978): "The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment." *Ray*, 435 U.S. at 165.[5]

A. Many of the Arguments or Concerns Raised by the State of Washington and Its Supporters Are Undisputed and Are Irrelevant to the Constitutional Issues Raised

The State and its supporters raise a number of concerns that relate to fisheries, tourism, aesthetics, economics and state involvement in such non-vessel activities as shore-side terminal operations. These points are rhetorically attractive, but are neither contested nor relevant to the correct disposition of the constitutional issues raised by Intertanko and the United States. They have been put forward by the State, Respondent-Intervenors and supporting *amici* either to divert the Court's attention from the constitutional issues that have been raised by Intertanko and the United States or because of a profound misunderstanding of the nature of the litigation.[6]

5. Although not directly cited by the parties, the United States has directed our attention to an oversight in omitting the district court complaint in this action from inclusion in the Joint Appendix. For convenience of reference by the Court, we submit as an appendix to this brief a copy of the text of that complaint.

6. There is no dispute (other than relevance) in this litigation that marine oil spills can be commercially and environmentally devastating for all concerned; that prevention of such spills is a valid societal goal for all maritime nations; that advancements in marine oil spill prevention measures are desirable; that effective governmental regulation of tank vessels is essential to protecting the safety of the vessels, their crews, and the marine environment; that human error is a factor in many marine

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The briefs of the State, Respondent-Intervenors and like-minded *amici* also assume, wrongly, that local viewpoints, some passionately believed, necessarily render local judgments superior to those of the national government in the domain of vessel safety and marine environmental protection — areas expressly identified by Congress as the controlling reasons behind federal statutes here at issue. Although the State and Respondent-Intervenors have offered strongly-held defenses of the value of Washington State's marine safety regime, they do not point to any particular defect of the federal system that the State attempted to redress at the time the BAP rules were formulated.[7]

(Cont'd)
casualties; that the waters, islands and shoreline of Puget Sound are a priceless national treasure of enormous aesthetic and ecological bounty; that the *Exxon Valdez* accident was a needless, preventable tragedy caused by human failures; that creatures that dwell in the coastal areas of our maritime states merit, as a matter of ethical, moral and civic duty, the highest degree of protection and stewardship against intentional and careless depredations by humanity; that the depleted condition of the nation's fisheries, whether due to overfishing or to man-made insults to the ecosystem, should be a matter of both local and national concern; that hard-working citizens in coastal communities throughout the nation are vulnerable to damage to the littoral environment of the United States; that cooperation between federal, state and local authorities is a desirable circumstance that should be encouraged (within constitutional limits) and not frustrated; and that the Congress of the United States has, in specific circumstances not present here, expressly contemplated involvement by the individual states in matters that, absent federal agency agreement or express Congressional direction, would be exclusively federal.

7. The State does not directly argue that it is acting in gaps or voids in the federal regulatory structure. State Br. at 7-8 (admitting that some BAP requirements "mirror Coast Guard requirements, while others add on to existing Coast Guard requirements"); and at 12 and 31-32 (arguing that State is not attempting to "control ships," but directing "its regulations at owners and operators to avoid conflict with the operative provisions of international law."). Affidavits prepared for the district court by defenders of the State regime are essentially post hoc,

(Cont'd)

The assertion of a power to displace the federal government in an area that indisputably controls instrumentalities of interstate and foreign commerce and the relations of the United States with foreign powers is reminiscent of regional tensions in this country during the early Nineteenth Century. Although no doubt put forward with sincere confidence that local environmental concerns inspire wisdom superior to the wisdom generated by national environmental concerns, this doctrine has a clearly demonstrated historic toxicity. When, in 1830, vigorous advocates of local interests bridled against the federal role in the disposition of public lands, Daniel Webster took the floor of the Senate to describe the fate of federal authority as existing ". . . in every state but as a poor dependent on state permission. It must borrow leave to be, and it will be no longer than state pleasure or state discretion sees fit to grant the indulgence to prolong its poor existence."[8]

Federal law of indisputable constitutional validity is under the same attack from the State of Washington and its allies as were the functions of the federal land offices in the early Nineteenth Century. The local supremacy arguments that Daniel Webster denounced are indistinguishable in their philosophical underpinnings from those advanced by the State here. Though the subjects are different — tariffs and public lands in the early 1800s, vessel regulation now — the constitutional defects are the same. The correct response and disposition of this matter is necessarily that which Webster advanced. In matters of national significance clearly vouchsafed to the national government by the Framers, the national will must prevail over centrifugal local inclinations.

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litigation-inspired justifications of the State regime. Examination of the contemporary rulemaking record of the State's BAP regulations reveals that they were conceived of as general safety requirements promulgated without any articulated link to specific passages or waterways within Puget Sound or, for that matter, within the State of Washington. JA-129 to JA-132.

8. Recounted at WILLIAM SAFIRE, LEND ME YOUR EARS 251 (W.W. Norton, ed. 1992).

II. INTERTANKO, THE UNITED STATES AND SUPPORTING *AMICI* HAVE DESCRIBED MULTIPLE CONSTITUTIONAL AND STATUTORY SOURCES OF PREEMPTION. THE RATIONALE OF *RAY v. ARCO* CONTROLS DISPOSITION HERE.

The challenged incursions by the State of Washington into federally regulated subject matters of vessel safety and marine environmental protection are stark and uncomplicated. The narrow field which Intertanko argues is overwhelmingly preemptive is tank vessel operations, equipment, personnel qualifications and manning as enumerated in Title II PWSA and, if deemed applicable here, the "reporting and operating requirements" of Title I of PWSA. *See* 33 U.S.C. § 1221 *et seq.* (as amended); and Pet. App., App. E. at 98a-113a.[9]

9. Intertanko contends that all the challenged State vessel regulations collide with subject matters of the mandatory Title II PWSA (*see* 46 U.S.C. § 3703(a)) and are thus unsustainable because of the preemptive nature of these mandatory federal programs, standards and requirements. There appears to be some sentiment, even within the position of the United States, that certain of the Washington state regulations partake of Title I PWSA elements. For example, the State does, to be sure, contend that some of its rules are "operational requirements," *see* State Br. at 37-48, similar to the tug escort provisions that were upheld in *Ray*. *See* State Br. at 36; and *Ray*, 435 U.S. at 171-73. This distinction is no consequence to the position of Intertanko. Title II PWSA subject matters (tank vessel "design, construction, alteration, repair, maintenance, operations, equipping, personnel qualification and manning") are exclusively federal in their nature while Title I subject matters ("vessel traffic services and systems in ports, harbors or congested areas or when conditions are hazardous, weather conditions or reduced visibility warrant, anchoring or mooring, concerning explosive or other dangerous substances, waterfront safety zones and establishing minimum safety requirements against accidents and structures") leave room for state action only if the federal government has not acted to assert its authority. *See Ray*, 435 U.S. at 171-72. Thus, State regulations that address vessel "operations," as that term is used in Title II PWSA, or State regulations that address tank vessel "operating requirements," as that term is used in Title I PWSA,

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Ray's preemption conclusion with regard to Title II PWSA was based on the statutory structure of the PWSA in that Congress had mandated: a) that the Secretary of Transportation promulgate rules governing the design, construction and operation of tankers; (b) that state governments and others be consulted in the development of these rules; and (c) that a system of certifications and inspections should govern compliance and serve as permits for vessel operations. These factors, coupled with clear legislative history endorsing uniform national standards led to the Court's view that the challenged State design and construction laws were subject to field preemption. *Ray*, 435 U.S. at 161-163. The pervasiveness of this vessel safety regime, much expanded in intervening years since *Ray*, leads to confidence in federal intent to preempt because the activity of tank vessels is subject to federal permission, inspections by federal personnel and subject to federal commands. *City of Burbank v. Lockheed Air Terminals, Inc.*, 411 U.S. 624, 634 (1973). These factors apply no differently to the remaining elements of Title II PWSA than they do to vessel design and construction.[10]

(Cont'd)
are here equally unsustainable under established preemption principles, given that federal action has occupied even the Title I fields that might be argued to coincide with certain of the BAP Regulations.

10. The State's efforts to cast doubt on the field preemptive effect of Title II PWSA, include reference to the Court's preservation of the State's requirement that non-U.S. flag vessels carry a state pilot. The State passes off this unremarkable element of Ray as addressing a "manning" requirement of the sort that would normally be governed by Title II PWSA and then argues that its preservation establishes that all Title II subject matters are not part of the preempted field found for the design, construction and equipment elements of *Ray*. State Br. at 21. The Court could not have done otherwise given the nearly two hundred year federal statutory grant of authority to the states to require state pilots for certain vessels. The Court's disposition of this issue is clearly based on an express federal dispensation granted the states and had no relationship to the Title II PWSA subject matters that compel a preemptive finding in this litigation.

III. TRADITIONAL STATE AND LOCAL POWERS OF THE POLICE DO NOT APPLY TO REGULATION OF INTERSTATE AND INTERNATIONAL VESSEL EQUIPMENT, MAINTENANCE, OPERATIONS, PERSONNEL QUALIFICATIONS AND MANNING ISSUES. THESE ARE ON-BOARD, PRIMARY CONDUCT MATTERS THAT ARE THE TRADITIONAL, EXCLUSIVE PRESERVE OF FEDERAL AUTHORITIES.

A dominant theme of the briefs of the State, Respondent-Intervenor, and their *amicus* supporters is the assumption that federal regulation of tank vessels acts here to compromise valid powers of the police when states elect to enter this regulatory field. Whatever merit there may be to the general proposition that "the historic police powers of the states were not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress,"[11] no such police powers are at issue here. The resort to this defense here is "simply invoking the convenient apologetics of the police power." *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761, 780 (1945) (citations omitted).

The State, by invoking a police powers defense of its actions, grasps at two themes that run through much of the Court's preemption jurisprudence.[12] The first is the oft-cited

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11. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). State Br. at 13.

12. The *Amicus* Brief of the National Association of Waterfront Employers and Signal Mutual Indemnity Association, Ltd. discusses distinctions between Commerce Clause preemption jurisprudence decisions and decisions based primarily on the Admiralty Clause. *See* Waterfront Employers *Amicus* Br. at 14-17. They correctly submit that the analysis under the two clauses is fundamentally different and recite that no presumption of validity, under police powers or otherwise, has been extended by the courts to state laws that impinge on Admiralty Clause subject matters. Waterfront Employers *Amicus* Br. at 27. Intertanko has argued that the Admiralty Clause, U.S. Const. Art. III, (Cont'd)

presumption against preemption phraseology of *Medtronic*, quoted above. The second is language set out in the line of cases defined by *Huron Portland Cement v. Detroit*, 362 U.S. 440 (1960); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977); and *Ray, supra*. These three cases contain language that appears to leave some limited room for state regulation of federally-licensed vessels if the state action constitutes "reasonable, nondiscriminatory conservation and environmental protection *measures otherwise in their police powers*." *Douglas*, 431 U.S. at 277 (citing *Huron*, 362 U.S. at 447); and *Ray*, 435 U.S. at 164 (quoting *Douglas*) (emphasis supplied). Like the oft-stated presumption against displacement of police powers that runs from *Rice v. Santa Fe Elevator Corp.* through *Medtronic v. Lohr*, the language expressing solicitude for "reasonable, non-discriminatory conservation and environmental protection measures" assumes that a valid use of police powers underlies the challenged state regulation.[13]

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§ 2, is part of the several indicators of clear intent of the Framers to place matters maritime within the realm of legitimate federal authority that must overcome state actions in maritime fields. Intertanko, however, has relied, because of the clear guidance of *Ray* and the significant expansion of the scope of federal safety and environmental programs since *Ray*, primarily on the direct application of Supremacy Clause principles to the considerable body of federal statutory and administrative law that has matured since *Ray* was decided. This reliance was intended to provide the shortest route to a preemption decision on summary judgment in the district court, but should not be taken to devalue the power of Admiralty Clause arguments advanced by *amici*.

13. The State appears to disclaim an "authority or ability" to bar vessels from Washington State waters. State Br., n.5. Intertanko does not know whether these statements before this Court are recognitions of constitutional limitations on State action or are, instead, simply statements that the State of Washington lacks the resources and ability to apply coercive measures to vessels that fail to comply with its requirements. Whatever the import of these statements, they cannot save the State regulations from constitutional scrutiny. The statements, however, may be significant for the State's claim that these vessel rules

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Intertanko strongly disputes that the states have ever possessed the authority to regulate the on-board appurtenances, operations, conduct, or qualifications of vessels and their crews.[14] After nearly five years of this litigation, the State of Washington has offered no examples to change Intertanko's conclusion that on-board vessel safety has been exclusively federal.[15] From *Gibbons v. Ogden* forward,[16] state efforts to regulate vessel-related subject matters have succeeded primarily

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lie within traditional police powers of the State. These apparent concessions, whatever their intended meaning, cannot be reconciled with the persistent claim that the State is exercising legitimate powers of the police over tank vessels subject to the regulations. If traditional police powers were at work here, the State would be in no position to disclaim, even for tactical reasons, the coercive authority that must accompany its police powers.

14. The 1973 decision of this Court in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) is cited by the respondent camp for its statement that "sea-to-shore pollution [is] historically within the reach of the police power of the States . . ." *See Br. of Amici California, Alaska et al.* at 1. *Askew* interpreted section 1161(o) of the federal Water Quality Improvement Act (84 Stat. 91) to permit the State of Florida to provide for additional liability quanta for clean-up costs and damages from spills. 411 U.S. at 329-330. The case is predominantly a remedies decision. It addressed State remedies governing "damages to the shore or shore facilities [that] were not cognizable in admiralty." 411 U.S. at 340. The "sea-to-shore pollution" deemed to be in "the reach" of state police powers for purposes of its *Askew* analysis is not presented by the facts of this case. Here the State asserts authority to regulate the primary conduct of vessels operating routinely, without reference to shore damage caused by a pollution incident. Intertanko does not contest the authority of the states to fashion remedies for pollution incidents.

15. Cases cited by the State at pages 14 and 15 of its brief are consistent with Intertanko's position that state regulation has been countenanced only at the periphery, and never at the heart of federal marine safety subject matters.

16. 9 Wheaton (22 U.S.) 1 (1824).

where there was no federal presence.[17] These limited permissions of state action have always partaken of voids in the federal system or have reflected that the state, while at times regulating at conceptually close quarters to the vessel itself was, in fact either providing a remedy, *see Askew*, 411 U.S. at 341, or was regulating secondary conduct away from the vessel itself. *See Huron*, 362 U.S. at 447. A final qualification that defeats all dependence by the State on the "*Huron/Douglas*" language quoted above, is this Court's subsequent statement in *Ray* that in none of the cases upholding state conservation and environmental protection measures did the challenged state law address the same object as the federal law said to be the source of preemptive effect. *Ray*, 435 U.S. at 164, 168;[18] *see also Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 106-

17. *See Kelly v. State of Washington ex. rel. Foss Co., Inc.*, 302 U.S. 1 (1937); and *Huron, supra*. The State of Washington vessel inspection program tolerated in *Kelly* addressed motor driven vessels not subject to federal controls over steam driven tugs. *Id.* at 5-8. The State law there at issue also expressly excepted from its application vessels that had been federally inspected. *Id.* at 14-15. The Court warned that

> If, however, the state goes farther and attempts to impose particular standards as to structure, design, equipment, and operation, which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the state will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule.

Kelly, 302 U.S. at 15.

18. Language reflecting the sensitivity of the Court to state authority sometimes appears in cases where the Court finds preemption in any event. *See, e.g., Douglas*, 431 U.S. 265 (Virginia limitations on menhaden fishing by non-residents set aside as preempted by federal vessel documentation statute); and *Ray*, 435 U.S. 151 (Washington State vessel requirements governing tank vessel construction, design and equipment preempted by the Ports and Waterways Safety Act). This solicitude is appropriate and essential, but has no application in fields such as this where pervasive federal regulations regulating the same objects for the same purposes are in place and operational.

107 (1992) (plurality opinion) (stating focus of preemption analysis is not purpose of act, but effect on federal regulation). Here, each of the challenged Washington State regulations falls squarely within categories of federal regulatory activity fully occupied by the federal government. *See* Pet. App., App. K at 349a-353a; and U.S. Brief, App. 1a-17a.[19] The complete congruence of subject matters and objects regulated by federal and State of Washington regulations (vessel operations, equipment, personnel qualifications and training) is the critical element of this case that distinguishes it from *Huron*, *Douglas*, and *Kelly v. State of Washington ex. rel. Foss Co., Inc*, 302 U.S. 1 (1937).[20] That some of these regulations are "local" in the

19. The State refers to its fixed interval requirement, requiring tankers to record their positions every fifteen minutes, as valid because, when the Coast Guard determined that designating a particular interval "would not be practicable in all navigable waters," it did not conclude that the requirement "is not practicable in Puget Sound." State Br. at 37. In a OMS Memorandum dated December 1, 1994, the Hearing Examiner's Report stated that, with respect to the 15 minute positioning requirement, "the rules have defined 'frequently' [used in international standards] for Washington State." JA-130. Under either rationale, Washington State does not have the authority to define that which the federal government has determined is not practicable to specify in U.S. navigable waters. The State now appears to be suggesting that for a federal regulation to have preemptive effect with regard to Washington State, it must be Puget Sound-specific. The havoc that such a requirement would create for uniform national vessel standards is obvious.

20. The PWSA authorizes the Secretary of Transportation to compel compliance of the "owner, master, or person in charge of any vessel subject to the provisions of this section." *See* PWSA of 1972, Pub. L. No. 92-340, Title II, § 201(ii), 86 Stat. 424 (codified as amended at 46 U.S.C. § 9101) (1972) (enacting penalties for violations by the "owner, master, or person in charge"). The State, seeking to evade the implications of the coincidence of its BAP Regulations with the subject matters and objects of federal law argues that it "has disclaimed power to 'control ships' " but instead "directs its regulation at owners and operators." State Br. at 12 and 31-32. This distinction is of no significance to the preemption analysis required here. Federal standards apply to the vessel, its owners and operators. *See* PWSA, *supra*.

sense that they are Washington State-specific may have bearing on the determination as to whether they are measured against Title I or Title II of PWSA for preemption purposes, but does not either validate the application of a police powers claim or render the challenged rules valid under the *Huron/Douglas/Ray* recognition of potentially valid state rules.[21]

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21. The Respondents and *amici* devote a significant portion of their briefs to a description of the ecosystem and navigation of the local waters of Puget Sound. Federal law regulating vessel design, construction, operations, manning, training, equipment and safety is versatile and flexible enough to protect local variations in waterways. Federal programs thus reflect local concerns, often more specifically than does the challenged State regime. Coast Guard regulations contain specific provisions addressing particular areas, such as: vessel traffic service areas and operating requirements in New York, Louisville, Houston/Galveston, Berwick Bay, St. Mary's River, San Francisco, Puget Sound and the Juan de Fuca region, and Prince William Sound (33 C.F.R. pt. 161); special operating regulations for over 40 U.S. waterways (33 C.F.R. pt. 162); regulated navigation and limited access areas for over 90 geographic regions (33 C.F.R. pt. 165); shipping safety fairways for the Atlantic Coast, Gulf of Mexico, Alaska and California (33 C.F.R. pt. 166); traffic separation schemes and precautionary areas for New York, Chesapeake Bay, and Galveston Bay (33 C.F.R. pt. 167); escort requirements for tankers in Prince William Sound and Puget Sound (33 C.F.R. pt. 168); safety zones around 15 platforms on the outer continental shelf (33 C.F.R. pt. 147); the establishment of almost 160 anchorage areas and grounds (33 C.F.R. pt. 110); and regulating the operation of approximately 450 drawbridges (33 C.F.R. pt. 117). OPA 90 itself addresses area specific requirements. (OPA 90 sections 3002 and 4108 (the Great Lakes); section 3003 (Lake Champlain); sections 3005 and 4116(c) (Puget Sound); sections 4116(a) and 4116(c), and Title V (Prince William Sound); section 6003 (the Outer Banks of North Carolina); and Title VIII (Alaska).

IV. SECTION 1018 OF THE OIL POLLUTION ACT OF 1990, BY ITS CLEAR LANGUAGE, AND ITS RELATIONSHIP TO OTHER FEDERAL STATUTES AND OTHER PROVISIONS OF OPA, IS CONFINED TO FEDERAL PERMISSION TO THE STATES AND LOCAL GOVERNMENTS TO IMPOSE LIABILITIES, PENALTIES AND REQUIREMENTS RELATED TO DISCHARGES OF OIL.

The Court of Appeals relied heavily on section 1018 of the Oil Pollution Act of 1990 (33 U.S.C. § 2718) to conclude that Congress had authorized intervention by states or political subdivisions thereof into the subject matters occupied by the federal government's vessel safety and environmental protection regime. Pet. App., App. A at 22a-24a, 34a. The State and Respondent-Intervenors understandably echo that reliance in their response briefs. *See* State Br. at 24-29; and Respondent-Intervenors Br. at 30-36. Respondent-Intervenors also argue that both Intertanko and the United States have "abandoned their earlier interpretations" of section 1018's import. Respondent-Intervenors Br. at 31. This is not the case. Intertanko has been consistent throughout this litigation in describing section 1018 of OPA 90 to be a savings provision, the extent of which was to preserve the *status quo ante* that governed federal/state relationships in the field of liability, financial responsibility requirements and penalties prior to the enactment of OPA 90.

A. Section 1018 of OPA Is a Liability and Compensation Savings Provision That Has No Impact on the Constitutional Issues Raised by the State of Washington's Incursions Into Federal Vessel Safety and Environmental Protection Subject Matters

Section 1018 left complex but generally complementary state/federal/local relationships with regard to liability, financial responsibility and penalties very much where they had been since the enactment of the Water Quality Improvement Act of

1970 ("WQIA").[22] OPA 90 consolidated a number of pre-existing oil spill liability provisions, all of which evolved from (as did OPA section 1018 itself) the initial formulation of section 1161(o) of the WQIA.[23] The consistent meaning, intent and interpretation of these statutes, all of which have contexts well beyond vessel source pollution on navigable waters, was to leave to states and localities discretion in fashioning the remedies or punishments that apply to pollution incidents. The matter was extensively briefed before the lower courts and is discussed in detail in Judge Graber's dissent to the Court of Appeals' denial of rehearing *en banc*. Pet. App., App. C at 78a-88a. A succinct summary of the many weaknesses of the State's use of section 1018 is presented in the *Amici* International Chamber of Shipping et al. at pages 4-6 of their *amicus* brief.

Respondents advocate an open-ended interpretation of section 1018's "requirements" language.[24] "Requirements"

22. Pub. L. No. 91-224, 84 Stat. 91 (1970). Section 1161(o) of WQIA stated that "[n]othing in this section shall be construed as preempting any State or political subdivision thereof from imposing *any requirement or liability* with respect to the discharge of oil into any waters within such State." *Id.* (quoted in *Askew v. American Waterways Operators*, 411 U.S. 325, 329 (1973) (emphasis in original)). *See* discussion of relation of *Askew* to the State's police powers argument at note 9, *supra*.

23. *See*, Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9614(a), ("additional liability or requirements"); the Deepwater Ports Act, 33 U.S.C. § 1517(k)(i), repealed by OPA 90 ("additional requirements or liability")); the Outer Continental Lands Act, 43 U.S.C. § 1820(c), repealed by OPA 90 ("additional requirements or liability"); the Trans-Alaska Pipeline Act, 43 U.S.C. § 1653(c)(9), repealed by OPA 90 ("additional requirements"); and the Federal Water Pollution Control Act, 33 U.S.C. § 1321(o)(2), amended by OPA 90 ("any requirements or liabilities").

24. Respondent-Intervenors Br., nn.24-26. The State is somewhat more restrained than Respondent-Intervenors. It is clear, however, that the State's position requires, implicitly, that the word "requirements" be given broad meaning outside the liability and compensation subject (Cont'd)

draws its meaning from the liability, compensation and penalties ambience of surrounding language. An axiom of statutory construction is that a word is known by the company it keeps ("*noscitur a sociis*"). This maxim is "wisely applied where a word [or phrase] is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). Thus, the term "requirements," which both the State and Intervenors isolate from the contextual language of OPA Title I and section 1018, cannot be commandeered and amplified to cover a variety of subjects well beyond "liability and requirements" relating to discharges and substantial threats of discharges.[25]

Respondent-Intervenors also theorize that the term "substantial threat of a discharge" in section 1018(c) expands, rather than preserves, state authority. Respondent-Intervenors Br. at 32 and n.24. Section 1018(c) deals with the ability of federal (hence the reference to "United States"), state and local governments to penalize or impose punitive liability on a responsible party for an incident, whether or not a spill into

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matters of Title I of OPA. *See* State Br. at 25-29. Subsections (a) and (c) of section 1018 speak solely of "liability" and "requirements" as those two words relate to either "discharge of oil" or "removal activities in connection with such a discharge" (subsection (a)) or the "substantial threat of discharge" (subsection (c)). Intertanko's Opening Brief noted that "discharge" and "substantial threat of discharge" are defined terms that have specific meanings. *See* Intertanko Br. at 46.

25. The immediate neighbors of section 1018 also use "requirements" as a term with financial connotations. Section 1016, under the heading "Financial Responsibility" has as its first subheading the term "Requirement." *See* 33 U.S.C. § 2716(a). Section 1016(e), "Methods of Financial Responsibility," uses the phrase "In promulgating *requirements* under this section . . ." *See* 33 U.S.C. § 2716(e) (emphasis added). Section 1019, entitled "State Financial Responsibility" makes clear that "A State may enforce on the navigable waters of the State the *requirements* for evidence of financial responsibility under section 1016." 33 U.S.C. § 2719 (emphasis added). "Requirements" is thus consistently used in Title I of OPA to connote financial responsibility requirements as they relate to liability and compensation for an incident.

navigable waters actually occurs. The "substantial threat" language of section 1018(c) predates OPA 90. Congress added "substantial threat" to 33 U.S.C. § 1321 in 1977. *See* Pub. L. No. 95-217, § 58(b) (1977), *reprinted in* 1977 U.S.C.C.A.N. 1566, 1594. The purpose was to "authorize the use of the contingency funds for protection against threatened discharges." H.R. Rep. No. 95-139, 95th Cong., 1st Sess. at 91 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4466. The term "substantial threat of a discharge" also is used throughout Title I of OPA 90 and the FWPCA (but notably *not* in Title 46, U.S.C., where federal prevention programs reside), securing it firmly to liability and response to an "incident."[26] As referenced by the report accompanying S. 686, the bill "deals only with discharges or significant threats of discharge that require a response or that cause damages." S. Rep. No. 101-94, 101st Cong., 2d Sess. at 11, *reprinted in* 1990 U.S.C.C.A.N. 722, 732-33 (1990).[27]

Whereas Intertanko has argued that the non-preemptive impact of OPA section 1018 is confined to Title I of OPA ("Liability and Compensation"), the United States has offered the broader observation that section 1018's impact, at its maximum, can be measured by the "Nothing in this Act" introductory clause. U.S. Br. at 44-45. The United States notes

26. An "incident" is "any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the *discharge* or *substantial threat of discharge* of oil." 33 U.S.C. § 2701(14) (emphasis added).

27. "Substantial threat of a discharge" also appears in numerous FWPCA and OPA 90 implementing regulations. *See* 15 C.F.R. § 990.30 (natural resource damages); 33 C.F.R. §§ 136.1 and 138.20 (financial responsibility); 33 C.F.R. pts. 154 and 155 and 40 C.F.R. pts. 112 and 300 (response plans); and 33 C.F.R. § 158.170 (suspension of permits), as well as in several state statutes. "Substantial threat of a release" is a term used in CERCLA (42 U.S.C. §§ 9604, 9622) and its implementing hazardous waste response regulations (29 C.F.R. pts. 300 and 307), as well as several state statutes. In none of these laws or regulations does the term "substantial threat" connote a vessel or facility operating routinely, the context presented here.

that the federal laws relied upon by Intertanko and the United States are not OPA (*i.e.*, "this Act"), but the PWSA and later treaties and enactments amplifying PWSA safety and environmental protection provisions. Although this concept is somewhat broader than Intertanko's interpretation of OPA 90 section 1018, it leads to the same conclusion. The response briefs of the State and its supporters do not address this argument. Congress, in enacting OPA, consolidated a number of similar liability and financial requirement provisions from pre-existing statutes, many of which, like OPA's section 1018, have application to non-maritime facilities, and made clear through the language of section 1018 that it was doing nothing to alter pre-existing powers of the state, local and federal governments.

B. The Legislative History Of Section 1018 Does Not Support Expansive Application Of Its Non-Preemption Provisions To Vessel Operations, Personnel Qualifications and Training

The State and Respondent-Intervenors point to purported confirmations of non-preemptive intent in Senate Reports that accompanied the provision that became OPA section 1018. State Br. at 35-36; and Respondent-Intervenors Br. at 26-29. The liability and compensation context of these statements confines their interpretative value to Intertanko's position that section 1018 preserves state, local and federal authority over liability and compensation that pre-dated OPA 90.[28]

28. The State offers up language of the Senate Report accompanying S. 686 that contains the phrase "no aspect of state oil spill programs is preempted." State Br. at 28. The "programs" discussed in that report are limited to liability, compensation funds, penalties, and financial responsibility. S. Rep. No. 101-94, *reprinted in* 1989 U.S.C.C.A.N. at 727-29. The State levitates this quotation out of a section that discussed existing penalty laws and the non-applicability of the 1851 Limitation of Liability Act, *see id.* at 739-40, one of the four acts specifically mentioned in section 1018. Additional language from the same report provides essential context: "S. 686 does not embrace any preemption of State oil spill liability laws, State oil spill funds, or State fee, taxes, or penalties used to contribute to such funds." S. Rep. No. 101-94, *reprinted in* 1989 U.S.C.C.A.N. at 740.

Not once in any of the House or Senate floor statements regarding final passage of OPA 90, including the numerous quotations found in the State's brief, is there a mention of expansion of state authority into vessel design, construction, operating, manning, training, equipment and safety. Constantly and consistently the terms "discharge," "oil spill," "liability," "compensation," "funds" and "clean-up" are used along with "preservation" of existing "State rights." Importantly, all discussion of states rights are limited to what eventually became Title I, "Liability and Compensation." If there were the slightest merit to the Respondents' claim that section 1018 injected the states into the realm of regulating vessel operations, one would expect to find at least one committee report passage or floor statement that addressed the dramatic legal and policy shift that the State advocates. The State has not identified an expression of any such sentiment. The PWSA and its later enacted descendants continue to be the controlling federal statutory scheme for regulating vessels, their operations, and their crews.

CONCLUSION

The decision of the Court of Appeals, to the extent it upheld Washington State regulations affecting tank vessels in the interstate and foreign commerce of the United States, should be reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),	No. 095-1096
Plaintiff,	[Stamp from Court]
vs.	COMPLAINT OF INTERTANKO FOR DECLARATORY RELIEF AND PERMANENT INJUNCTION AGAINST THE ENFORCEMENT OF CERTAIN STATUTES AND REGULATIONS OF THE STATE OF WASHINGTON PURPORTING TO REGULATE OPERATIONS, MANNING, AND EQUIPMENT OF TANK VESSELS IN INTERSTATE AND INTERNATIONAL COMMERCE
MIKE LOWRY, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State Of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County, DAVID NEEDY, Prosecutor of Skagit County; JAMES KRIDER, Prosecutor Of Snohomish County; and NORMAN MALENG, Prosecutor of King County,	
Defendants	

Plaintiff for its complaint herein alleges as follows:

Nature of the Case

1. This is an action to declare unconstitutional, unlawful and void, and to enjoin the enforcement of, the following statutes and regulations of the State of Washington:

Statutes: Title 88, Chapter 88.46, sections 88.46.010(2), 88.46.010(3), and 88.46.040(3) of the Revised Code of Washington, to the extent these statutory provisions require the establishment of Washington state regulations purporting to govern operational, personnel, management, technological or other aspects of tanker operations in the interstate and foreign commerce of the United States that are governed by federal law or international treaty;

Regulations: The following provisions of Chapter 317-21 of the Washington Administrative Code, which purport to govern operations, personnel qualifications, management techniques and practices, on-board equipment requirements and other aspects of tanker operations in the interstate and foreign commerce of the United States that are governed by federal law or international treaty as set forth more fully below: Sections 317-21-060 (1) and (2); 317-21-130 (1) through (4); 317-21-200 (1) through (6); 317-21-205 (1) through (3); 317-21-210 (1) through (4); 317-21-215 (1) through (10); 317-21-220 (1) through (3); 317-21-225; 317-21-230 (1) through (5); 317-21-235 (1) through (7); 317-21-240 (1) and (2); 317-21-245 (1) through (3); 317-21-250 (1) and (2); 317-21-255 (1) and (2); and 317-21-260 (1) through (5); 317-21-265 (1) and (2); and 317-21-540 (1) through (5).

The foregoing statutes and regulations are part of the State of Washington's "Best Achievable Protection" plan, and are herein referred to collectively as the "BAP Regulations".

Jurisdiction and Venue

2. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1331(a) and 1337(a). This is a civil action arising under the Constitution, laws and treaties of the United States, and specifically arising under Acts of Congress regulating commerce, navigation, and international affairs. This action presents an actual case or controversy appropriate for declaratory relief pursuant to 28 U.S.C. § 2201(a).

3. Venue of this action properly lies in this Court pursuant to 28 U.S.C. § 1391(b). The defendants reside in the Western District of Washington, the events that gave rise to this action arose in this district, and the actions of defendants to be enjoined would otherwise occur in this district.

Parties

4. Plaintiff INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (hereinafter, "INTERTANKO") is an unincorporated association of independent tanker owners based in Oslo, Norway. Other pertinent information regarding INTERTANKO is as follows:

a. INTERTANKO's members represent, on a tonnage basis, approximately eighty per cent (80%) of the world's independently owned (i.e. non-government-owned or oil company owned) self-propelled tank vessel ("tanker") fleet. INTERTANKO's members include owners and operators of U.S.-documented tankers and foreign documented tankers whose countries of documentation have entered into treaties and international agreements with the United States pertaining to tanker operations. Many INTERTANKO members own or operate tankers that currently call at ports in the State of Washington while engaged in interstate and foreign commerce on the navigable waters of the United States. These owners and operators are directly affected by the statutory and regulatory provisions that are the subject of this complaint. Other INTERTANKO members whose vessels do not presently call at Washington ports are also affected by the statutory and regulatory provisions that are the subject of this complaint, to the extent that these provisions constitute impermissible barriers to their use of Washington state ports even when vessels have complied with federal laws and international treaties.

b. One of INTERTANKO's principal purposes as an organization is to foster effective and uniform international standards for tanker operations and safety. To the extent that the State of Washington's statutory and regulatory provisions applicable to tanker operations differ from or are inconsistent with established U.S. and international standards, both INTERTANKO members and INTERTANKO itself are adversely affected.

c. As is set out more fully below, INTERTANKO's members are adversely affected by the State of Washington's statutory and regulatory provisions because tanker owners and operators are required to operate, man, manage, and equip their vessels in order to operate in the State of Washington in a manner different from requirements applicable in other states of the United States, and in other countries. This lack of uniformity represents a burden on and expense to INTERTANKO's members calling at Washington ports. Moreover, this lack of uniformity impairs federal superintendence of federal tanker manning, operational and safety standards and presents a threat to international maritime safety.

5. Defendant Mike Lowry is the Governor of the State of Washington. He is the chief executive officer of the State and is therefore responsible for implementation and enforcement of the State's laws.

6. Defendant Christine O Gregoire is the Attorney General of the State of Washington, and in such capacity is responsible for enforcing the State's laws, including the BAP Standards challenged herein.

7. Defendant Barbara J. Herman is the Administrator of the State of Washington Office of Marine Safety (hereinafter, "OMS"). The Office of Marine Safety was established pursuant to Revised Code of Washington (hereinafter R.C.W.) § 43.211.010 and is responsible for the development, implementation and enforcement of the challenged BAP Regulations.

8. Defendant David MacEachern is Prosecutor of Whatcom County, in which plaintiffs' vessels make regular calls. He has jurisdiction to bring criminal prosecution against tanker owners and operators for violation of the BAP Standards taking place in that county.

9. Defendant David Needy is Prosecutor of Skagit County, in which plaintiffs' vessels make regular calls. He has jurisdiction to bring criminal prosecution against tanker owners and operators for violation of the BAP Standards taking place in that county.

10. Defendant James Krider is Prosecutor of Snohomish County, in which plaintiffs' vessels make regular calls. He has jurisdiction to bring criminal prosecution against tanker owners and operators for violation of the BAP Standards taking place in that county.

11. Defendant Norman Maleng is Prosecutor of King County, in which plaintiffs' vessels make regular calls. He has jurisdiction to bring criminal prosecution against tanker owners and operators for violation of the BAP Standards taking place in that county.

The Challenged Statute and Regulations

12. The BAP Regulations that are the subject of this complaint were issued pursuant to R.C.W. Chapter 88.46. This statute (R.C.W. §§ 88.46.010, *et seq.*) was enacted by the Washington State Legislature in 1991 and signed into law by Governor Booth Gardner on May 21, 1991. The statute became effective on July 1, 1991.

13. The statute contains various provisions requiring owners and operators of tank vessels to file oil spill prevention and response plans with OMS. Failure to file acceptable plans subjects violators to statutory penalties and a prohibition on calling at Washington ports. R.C.W. §§ 88.46.070; 88.46.080; 88.46.090.

14. R.C.W. § 88.46.040 (3), provides that OMS ". . . shall only approve a prevention plan if it provides the best achievable protection from damages caused by the discharge of oil into the waters of the state. . . ." Pursuant to R.C.W. §§ 88.46.010 (2) and 88.46.010(3), OMS is to define the term "Best Achievable Protection" by regulation. Section 88.46.040 (1) provides that "the office [i.e. OMS], by rule, shall establish standards for spill prevention plans."

15. Pursuant to the aforementioned statutory provisions, OMS issued interim regulations on November 24, 1992. Under Washington Administrative Code ("WAC") 317-20, these regulations became effective December 24, 1992. Amplifying regulations were issued on March 4, 1993, and became effective on April 4, 1993.

16. The current "best achievable protection" standards were adopted by OMS and promulgated as binding rules as part of WAC 317-21 on December 9, 1994. Under WAC 317-21-410, an oil spill prevention plan that meets the standards will be approved as best achievable protection of state waters and marine environments. Under WAC 317-21-500, an owner or operator of a tank vessel who fails to comply with the regulations is subject to the following administrative actions: (1) plan disapproval; (2) restriction of the tank vessel's movements or operations in state waters, or both; (3) assessment of civil penalties under R.C.W. 88.46.090: (4) referral for prosecution under R.C.W. 88.46.080; or (5) denial of entry into state waters. This regulation also repealed the previous oil spill prevention plan requirements contained in WAC 317-20.

17. For the declared purpose of protecting state waters and shorelines from the danger of oil spills, the BAP Regulations impose substantial restrictions on the manning, training, operation and safety and equipage of oil tankers in Washington waters. WAC 317-21-060 defines "best achievable protection" and "best achievable technology". Examples of requirements are: WAC 317-21-130 requires owners and operators to submit a summary of events involving their vessels over the past five years and to report events after the submission of their Prevention Plan. WAC 317-21-200 mandates that a company's Prevention Plan include provisions that tanker crews: (1) make security rounds every two hours; (2) plot the vessel's position every hour while at anchor; and (3) man both the engine room and engine control room while maneuvering. WAC 317-21-205 requires a plan to include the following standards: (1) the taking of a vessel's position every 15 minutes while underway; (2) a requirement for comprehensive voyage planning; and (3) a requirement that navigation watches check the tanker's gyrocompass "frequently". WAC 317-21-210 requires that the plan to include requirements to: (1) inspect the steering gear room hourly; and (2) secure scoop injection cooling water systems. WAC 317-21-215 requires pre-arrival tests and inspections. WAC 317-21-220 imposes standards for emergency operating procedures. WAC 317-21-225 establishes state control over tanker navigation records. WAC 317-21-230 requires that a Prevention Plan establish a comprehensive training program covering orientation of new crew members, position-specific training, refresher training, and shipboard drills. WAC 317-21-235 imposes random, pre-employment, probable cause and post-accident drug and alcohol testing for

crewmembers. WAC 317-21-240 requires reviews of personnel performance. WAC 317-21-245 establishes work hour limits. WAC 317-21-250 requires that crewmembers use a common language. WAC 317-21-255 requires the maintenance of training and work hour records. WAC 317-21-260 requires owners and operators to establish: (1) a "Safety and Environmental Protection Management System"; (2) a quarterly vessel visitation program; (3) a preventive maintenance program; and (4) a critical area inspection program. WAC 317-21-265 requires all tankers to have on board: (1) Global Positioning System ("GPS") receivers; (2) radars and Automated Radar Plotting Aids; and (3) a marker buoy, pick-up gear, and a towing pennant at both ends of the tanker that are deployable in 15 minutes without electrical power. WAC 317-21-540 requires advance notice of vessel entry and safety reports.

Federal Statutes, Regulations and Treaties

18. The BAP Regulations invade a field of regulation that has been comprehensively occupied by federal statute, regulation, and treaties to which the United States is a party. The Government of the United States has undertaken comprehensive regulation of operations, manning, safety, training, equipage, design, and personnel qualifications with respect to oil tanker operations in interstate and foreign commerce.

19. Federal occupation of the relevant field is demonstrated by Subtitle II of Title 46, United States Code, Shipping (hereinafter "Title 46"), Pub. L. 98-89, 97 Stat. 500 (August 26, 1983), as amended; the Ports and Waterways Safety Act, as amended by the Port and Tanker Safety Act of 1978, Pub. L. 95-474, 92 Stat. 1471 (October 17, 1978); the Act to Prevent Pollution from Ships, Pub. L. 96-478, 94 Stat. 2298 (October 21, 1980), as amended; the Oil Pollution Act of 1990, Pub. L. 101-380, 104 Stat. 434 (August 18, 1990), and the International Regulations for Preventing Collisions at Sea, Pub. L. 95-75, 91 Stat. 308 (July 27, 1977), as amended. Federal laws and regulations promulgated under these statutes and others establish a comprehensive regulatory scheme for vessel design, equipment and navigational control, and thus embrace both the objectives and regulatory scheme of the BAP Regulations.

20. With respect to U.S.-documented tankers, the following federal statutes and treaties evidence occupation of the field by the federal government: Convention on the International Regulation for Preventing Collisions at Sea, 1972 (28 UST 3459, T.I.A.S. No. 8587); the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1978 (T.I.A.S.); the International Convention for the Safety of Life at Sea, 1974 (32 UST 47, T.I.A.S. No. 9700); International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (T.I.A.S.); 33 U.S.C. § 1223, vessel operating requirements; 33 U.S.C. § 1227, investigatory powers; 33 U.S.C. § 1228, conditions for entry to ports in the United States; 33 U.S.C. §§ 1602 and 2005, lookouts; 33 U.S.C. §§ 1602 and 2019, conduct of vessels in restricted visibility; 33 U.S.C. Chapter 33, prevention of pollution from ships; 46 U.S.C. Chapter 37, carriage of liquid bulk dangerous cargoes; 46 U.S.C. § 3703, regulations; 46 U.S.C. § 3707, tanker minimum standards; 46 U.S.C. § 3708, self-propelled tank vessel minimum standards; 46 U.S.C. § 3714, inspection and examination; 46 U.S.C. § 3717, marine safety information system; 46 U.S.C. § 6101, marine casualties and reporting; 46 U.S.C. § 6102, state marine casualty reporting system; 46 U.S.C. § 6301, investigation of marine casualties; 46 U.S.C. Part E, merchant seamen licenses, certificates and documents; 46 U.S.C. § 7101, issuing and classifying licenses and certificates of registry; 46 U.S.C. § 7302,

issuing merchant mariners' documents and continuous discharge books; 46 U.S.C. Chapter 75, general procedures for licensing, certification, and documentation; 46 U.S.C. Chapter 77, suspension and revocation; 46 U.S.C. Part F, manning of vessels and watches; 46 U.S.C. § 8301, minimum number of licensed individuals; 46 U.S.C. § 8304, implementing the Officers' Competency Certificates Convention, 1936; 46 U.S.C. Chapter 85, pilots; 46 U.S.C. § 8702, certain crew requirements; 46 U.S.C. § 8703, tankermen on tank vessels; and 46 U.S.C. § 9102, standards for tank vessels of the United States.

21. With respect to foreign-documented tankers, the following federal statutes and treaties evidence federal occupation of the field: Convention on the International Regulations for Preventing Collisions at Sea, 1972 (28 UST 3459, T.I.A.S. No. 8587); the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 (T.I.A.S.); the International Convention for the Safety of Life at Sea, 1974 (32 UST 47, T.I.A.S. NO. 9700); the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (T.I.A.S.) (hereinafter referred to as "STCW"); 33 U.S.C. § 1223, vessel operating requirements; 33 U.S.C. § 1227, investigatory powers; 33 U.S.C. § 1228, conditions for entry to ports in the United States; 33 U.S.C. §§ 1602 and 2005, look-outs; 33 U.S.C. §§ 1602 and 2019, conduct of vessels in restricted visibility; 33 U.S.C. Chapter 33, prevention of pollution from ships; 46 U.S.C. Chapter 37, carriage of liquid bulk dangerous cargoes; 46 U.S.C. § 3703, regulations; 46 U.S.C. § 3707, tanker minimum standards; 46 U.S.C. § 3708, self-propelled tank vessel minimum standards; 46 U.S.C. § 3711, evidence of compliance by foreign vessels; 46 U.S. C. § 3714 , inspection and examination; 46 U.S.C. § 3717 marine safety information system; 46 U.S.C. § 6101, marine casualties and reporting; 46 U.S.C. § 6102, state marine casualty reporting system; 46 U.S.C. § 6301, investigation of marine casualties; 46 U.S.C. § 8304, implementing the Officers' Competency Certificates Convention, 1936; 46 U.S.C. Chapter 85, pilots; and 46 U.S.C. § 9101, standards for foreign tank vessels.

22. Pursuant to the foregoing statutes and conventions, the United States Coast Guard has, under authority delegated by the U.S. Secretary of Transportation, promulgated detailed regulations that implement Congressional mandates concerning operations, manning, safety, training, equipage, design, and personnel qualifications with respect to oil tanker operations in interstate and foreign commerce. These regulations are: 33 C.F.R. § 153.201 *et seq*., reporting of a discharge of oil or hazardous material; 33 C.F.R. § 155.205, discharge removal equipment for vessels 400 feet or greater in length; 33 C.F.R. § 155.235, emergency towing capability for oil tankers, 33 C.F.R. §§ 161.128 through 161.136 and §§ 161.227 through 161.236, vessel reporting requirements and vessel traffic system in Puget Sound and Straits of Juan de Fuca; 33 C.F.R. § 160.201 *et seq*., notifications of arrivals, departures, hazardous conditions and certain dangerous cargoes; 33 C.F.R. § 164.11, navigation underway, general; 33 C.F.R. § 164.13, navigation underway, tankers; 33 C.F.R § 164.19, requirements for vessels at anchor; 33 C.F.R. § 164.25, tests before entering port or getting underway; 33 C.F.R. § 164.35, equipment, all vessels including internal vessel communication; 33 C.F.R. § 164.37, equipment, vessels of 10,000 gross tons or more; 33 C.F.R. § 164.38, automatic radar plotting aids (ARPA); 33 C.F.R. § 164.39, steering gear for foreign tankers; 33 C.F.R. § 164.41 electronic position fixing devices; and 33 C.F.R. § 164.61, marine casualty reporting and record retention; 46 C.F.R. § 4.04-1, reports of potential vessel casualty; 46 C.F.R. § 4.05-1, notice of marine casualty; 46 C.F.R. § 4.05-12, alcohol or

drug use by individuals directly involved in casualties; 46 C.F.R. § 4.05-15, retention of voyage records; 46 C.F.R. § 4.06-1, responsibilities of the marine employer; 46 C.F.R. Part 10, licensing of maritime personnel; 46 C.F.R. Part 12, certification of seaman; 46 C.F.R. Part 15, manning requirements; 46 C.F.R. § 15.405, familiarity with vessel characteristics; 46 C.F.R. § 15.701, Officers Competency Certificates Convention, 1936; 46 C.F.R. § 15.705, watches; 46 C.F.R. § 15.710, working hours; 46 C.F.R. 15.730, language requirements; 46 C.F.R. § 15.850, lookouts; 46 C.F.R. Part 16, chemical testing; 46 C.F.R. § 16.207, conflicts with foreign laws; 46 C.F.R. § 16.210, pre-employment testing requirements; 46 C.F.R. § 16.220, periodic testing requirements; 46 C.F.R. § 16.230, random testing requirements; 46 C.F.R. § 16.240, serious marine incident testing requirements; 46 C.F.R. Subchapter B, Merchant Marine Officers and Seamen; 46 C.F.R. Subchapter D, tank vessels; 46 C.F.R. Subpart 30.30, interim procedures for evaluating vessel personnel licensing and certification programs of foreign countries; 46 C.F.R. § 32.15-30, radar requirements; 46 C.F.R. § 35.05-15, watchman for a tank vessel; 46 C.F.R. § 35.05-25, illness, alcohol, and drugs; 46 C.F.R. § 35.20-10, steering gear test; 46 C.F.R. § 35.20-20, master's and officer's responsibility; and 46 C.F.R. Subpart 58.25, steering gear.

23. Under international law, the country of registry of a vessel is responsible for adopting and enforcing laws to protect the welfare of the crew and passengers aboard a ship and to maintain good order thereon, and for ensuring that activities aboard the ship do not endanger other ships or the marine environment. This responsibility continues at all times, wherever the ship is located. Article 94 of the International Convention on the Law of the Sea requires flag states to take such measures as are necessary to ensure safety at sea with regard to (i) the construction, equipment and seaworthiness of ships; (ii) the manning of ships, labor conditions, and the training of crews; (iii) the use of signals, the maintenance of communications and the prevention of collisions; and (iv) the qualifications of the ships' masters and their officers. The flag state (*i.e.*, the nation under whose flag the vessel operates) has the primary obligation to ensure that its ships respect generally accepted international anti-pollution rules and standards and that they comply with domestic laws and regulations. A country of registry is also obligated to prohibit its ships from sailing unless they have complied with such international rules and standards, and have also met the flag state's own law, especially those related to design, construction, equipment and manning of ships. "Other states must accept the certificates issued by the flag state as evidence of the condition of the ship, unless there are clear grounds for believing that the condition of the ship does not correspond substantially to the certificates." Art. 217(1)-(3), International Convention on the Law of the Sea ("UNCLOS").

24. The United States has entered into a series of bilateral treaties which provide vessels of either contracting party to have liberty, on equal terms with vessels of the other party, to trade to all ports, places and waters of the other party open to foreign commerce and navigation.

25. The Washington State OMS has issued a publication entitled "Model Oil Spill Prevention for Tankers" that expressly identifies differences between the new BAP Regulations and the applicable federal and international standards. This publication expressly acknowledges distinctions between the BAP Regulations and established federal and international standards.

26. The establishment of standards governing the operations, manning, safety, training, equipment

requirements, and personnel qualifications of persons or entities operating tankers in the interstate and foreign commerce of the United States vitally affects a phase of interstate and foreign commerce in which national uniformity is essential and which therefore demands exclusive federal regulation.

27. By purporting to establish separate and distinct state requirements in these areas through the BAP Regulations, authorities of the State of Washington and OMS have unlawfully impinged upon federal power to regulate interstate and foreign commerce and foreign affairs, have impaired federal superintendence of these areas, and have imposed an undue burden upon such commerce.

28. Economical and safe use of tankers requires the flexibility for each tank vessel to serve many ports. The BAP Regulations, alone or in conjunction with differing requirements of other coastal states, will restrict the ports at which tankers can call without implementing special procedures or equipment requirements peculiar to the State of Washington and thereby prevent the efficient use of tankers.

29. To the extent that regulation of oil tankers imposes limitations on the use of the world's tanker fleet, such regulation is of significant concern to the principal maritime trading nations. Because of the international nature of tanker ownership, operation, and trading patterns, the regulation of tanker design, equipage, manning, personnel qualification and operations by international agreement has been deemed desirable, by the United States and other maritime nations.

30. Prevention of oil pollution by establishment of standards of tanker manning, personnel qualification, design, equipment and operation is also an issue of major international concern, as is evidenced by international agreements cited herein.

31. Additional requirements imposed by the BAP Regulations in the area of vessel design and construction and required safety and navigation equipment are in derogation of the international scheme to which the United States has subscribed, and are therefore invalid. The BAP Regulations, by prohibiting foreign documented oil tankers that comply fully with federal and international requirements from entering Washington waters or by penalizing such tankers for not meeting the additional requirements of the Washington law, constitute a refusal to recognize the certificate of the foreign government that the vessel is fit for the service in which it is engaged, and therefore conflict with the obligations of the United States under international conventions.

32. Unilateral action by authorities of the State of Washington purporting to impose standards of tanker design, manning, safety, personnel qualification, equipage, and operations substantially undermines the efforts of the federal government to secure international agreement on tanker regulation, and the bilateral treaties of free navigation, and thus infringes the treaty-making and foreign affairs powers of the federal government.

33. Through the BAP Regulations, authorities of the State of Washington purport to exercise jurisdiction beyond what is recognized by international law as permissible by a port or coastal state. The BAP Regulations clearly intrude upon areas specifically mandated to flag states' jurisdiction.

FIRST CAUSE OF ACTION

FOR DECLARATORY JUDGMENT

34. Plaintiff realleges and incorporate herein by reference the allegations set forth in paragraphs 1 through 33, as if fully set forth herein.

35. The validity and enforceability of the BAP Regulations create an actual controversy between Plaintiff and Defendants within the jurisdiction of this Court, which controversy may be determined by a judgment of this Court.

36. By reason of the Supremacy Clause of the Constitution of the United States of America (Article VI, Clause 2), the Commerce Clause (Article I, Section 8, Clause 3) and the Foreign Affairs Clause, (Article II, Section 2, Clause 2), the BAP Regulations are pre-empted by the federal statutes and international conventions cited above. This Court should therefore declare them unenforceable.

SECOND CAUSE OF ACTION

FOR PERMANENT INJUNCTION

37. Plaintiff realleges and incorporates by reference the allegations set forth in paragraphs 1 through 36, as if fully set forth herein.

38. The BAP Regulations unlawfully interfere with federal and international regimes governing tank vessel operations and are pre-empted by the exclusive jurisdiction of the Government of the United States, and particularly the United States Coast Guard.

39. Unless the Defendants are enjoined from enforcing the BAP Regulations, plaintiffs will suffer immediate and irreparable harm for which there is no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays this court for judgment as follows:

1. For a declaration that:

(a) the BAP Regulations are unconstitutional, void and unenforceable; and,

(b) defendants may not promulgate, implement or enforce the BAP Regulations because they are pre-empted by federal law.

2. For an injunction prohibiting defendants, their agents, and any person acting on their behalf, at their direction or under their control from taking any action to implement or enforce the BAP Regulations.

3. That plaintiff recover its costs and disbursements herein together with such other and further relief as the Court may deem just and proper.

DATED this 17th day of July, 1995. [Handwritten dates]

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Supreme Court, U.S.
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Nos. 98-1701 and 98-1706

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL.

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), PETITIONER

v.

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Our opening brief explains how Titles I and II of the Ports and Waterways Safety Act (PWSA), as amended by the Port and Tanker Safety Act (PTSA) and supplemented by international agreements and implementing Coast Guard regulations, preempt state vessel and navigation rules. First, Title II of the PWSA vests exclusive authority in the Secretary to promulgate rules addressing a number of subjects encompassed by the Washington BAP rules and to issue licenses certifying compliance with those federal requirements. As recognized in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), because Congress intended the Secretary to decide what rules are necessary in the general areas specified in Title II, that Title preempts state rules in those areas even in the absence of a federal requirement precisely on point. And, under an unbroken line of this Court's cases starting with *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), a federal license to operate a vessel may not be supplemented or interfered with by a state requirement. Second, if the Coast Guard has promulgated a federal navigation rule under Title I of the PWSA or determined that there should be no rule on the subject, a state rule on the same subject is ousted. In the absence of such a Coast Guard rule or determination on a matter falling within Title I, however, the state rule would not be preempted. That two-prong approach is mandated by the language of the PWSA (see U.S. Br. 24-28) and this Court's construction of Titles I and II of the PWSA in *Ray* (see *id.* at 25-27), and is consistent with the long history of federal vessel regulation (*id.* at 18-23).

Respondents variously argue that the text of the PWSA does not support our submission, that *Ray*'s holding is limited to design and construction standards for vessels, that inherent state police powers authorize the rules promulgated by the State, and that Section 1018 of the Oil Pollution Act

should be construed to authorize the BAP rules. Those arguments are unpersuasive.

A. State Vessel And Operator Rules Within The Subject Areas Covered By Title II Of The PWSA Are Preempted

Title II of the PWSA (as amended by the PTSA) requires that "the Secretary shall issue, and may from time to time amend or repeal, regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, or manning of vessels * * * as may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." 92 Stat. 1483 (codified at 46 U.S.C. 3703(a)). Title II also requires a vessel operator to carry a certificate showing compliance with those rules issued by the Secretary, which, in the case of foreign-flag vessels, may be met with a valid certificate "issued by a foreign nation pursuant to any treaty, convention, or other international agreement to which the United States is a party." 92 Stat. 1486-1487 (codified as amended at 46 U.S.C. 3710, 3711 (1994 & Supp. III 1997)). Thus, Title II preempts state rules in two ways: (1) the Secretary's exclusive duty to promulgate rules with respect to subjects covered by Title II preempts the field as to those subjects; and (2) the holder of a federal license may not be required to meet state standards that would alter or modify a licensee's right to operate a vessel in accordance with the federal license.

1. As confirmed in *Ray*, PWSA Title II preempts state law in the fields addressed by that Title. See U.S. Br. 24-28. Respondents argue that *Ray*'s holding with respect to Title II subjects is limited to design and construction features of vessels. See Wash. Br. 20-24; Resp.-Int. Br. 19.[1] The text of

[1] Respondent-Intervenors describe *Ray*'s holding as a "plurality" of the Court (Br. 19), but that is plainly incorrect. The Court's opinion with respect to Parts I, II, and III was unanimous, seven justices joined Parts V and VII, and six justices joined Parts IV and VI. See 435 U.S. at 181 (Marshall, J., concurring in part and dissenting in part); *id.* at 190 (Stevens, J., concurring in part and dissenting in part).

Title II, however, does not support respondents' argument that "design" and "construction" should be treated differently from "alteration, repair, maintenance, operation, equipping, personnel qualification, or manning of vessels," because all of those subjects appear in the same statutory phrase. See 46 U.S.C. 3703(a). See, *e.g.*, *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (words in a statutory provision should not be treated as "pebbles in alien juxtaposition"). Respondents' argument also is inconsistent with the House Report on the Tank Vessel Act of 1936, which first conferred authority to promulgate regulations on those subjects. That report, which was quoted by the Court in *Ray* (435 U.S. at 166), explained that the Act was intended to establish a "reasonable and *uniform* set of rules and regulations" not only for ship "construction" and "equipping," but also for "operation" and "manning." H.R. Rep. No. 2962, 74th Cong., 2d Sess. 2 (1936) (emphasis added) (quoted in U.S. Br. 23).

Moreover, the reasons given by the Court that the Title II design and construction requirements preempt those fields apply equally to the other fields listed in what is now 46 U.S.C. 3703(a). The Court emphasized the mandatory nature of the obligation Congress imposed on the Secretary, who "'*shall establish*' such rules and regulations as may be necessary with respect to the design, construction, *and operation* of the covered vessels *and with respect to a variety of related matters*." *Ray*, 435 U.S. at 161 (emphasis added); see also *id.* at 163 n.14 (noting the Secretary's authority under Title II "to insure that adequately trained personnel are in charge of tankers"); U.S. Br. 24. Although the State calls the "shall establish" language a "minor textual signal[]" (Wash. Br. 23), the *Ray* Court treated it as

significant in understanding why state rules in those fields under Title II are preempted. The Court noted the requirements that the Secretary engage in consultations before promulgating rules, 435 U.S. at 161[2]; inspect tank vessels "for compliance with the regulations which he is required to issue for the protection of the marine environment," *id.* at 162; and issue a certificate of compliance or accept a foreign certificate that entitles the vessel to navigate in U.S. waters free from state interference, *id.* at 163-164. The Court also emphasized that Congress had determined that uniformity and consistency with international standards applicable to the subjects covered by Title II would best achieve safety and environmental protection, "since the problem of marine pollution is world-wide." *Id.* at 166 (quoting S. Rep. No. 724, 92d Cong., 2d Sess. 23 (1972)).

Those considerations are as pertinent to the "alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels" (46 U.S.C. 3703(a)) as they are to a vessel's "design" or "construction" standards (*ibid.*).[3] State BAP rules on subjects covered by Title II, as

[2] Under the PWSA provision addressed by the Court in *Ray*, the Secretary was required to consult only with federal agencies. See 435 U.S. at 161 (discussing provision at 86 Stat. 429). That provision was amended by the PTSA to require consultation with "officials of State and local governments," "representatives of port and harbor authorities or associations," and "representatives of environmental groups." 92 Stat. 1484. Congress thus intended that state and local interests would be taken into account *by the Coast Guard* through the consultation process that precedes the adoption of a single federal rule, not imposed unilaterally by States and localities through their *own* independent rules.

[3] The amici States argue (Br. 16-18, 20) that the word "operation" should not be construed so broadly as to preempt exercises of state power to prevent pollution. Since the passage of the Tank Vessel Act of 1936, however, Congress has directed the Federal Government to regulate tankers "with respect to the operation of such vessels" (as well as design, construction, manning, and the duties and qualifications of officers and crew). Act of June 23, 1936, ch. 729, 49 Stat. 1889. See also PWSA, Pub. L. No. 92-340, Tit. II, § 201, 86 Stat. 428 (same language); PTSA, Pub. L. No. 95-474, § 5, 92 Stat. 1483 (inclusion of "operation" in list of other subjects). Those regulations with respect to vessel "operation," which are the subject of federal licenses, ordinarily have addressed mechanical or systems-based features of the vessel, or the manner in which personnel must be trained to use on-board equipment. See 46 C.F.R. 2.01-6 (describing "Certificates issued to foreign vessels" by referencing 46 C.F.R. Subch. D, Pt. 35, and 33 C.F.R. Pts. 155, 156, 157, 159, and 164). Moreover, those regulations impose quite stringent and specific anti-pollution standards for on-board equipment, transfer procedures, and handling of oil and other hazardous cargoes. Thus, aspects of vessel operations covered by Title II and by a federal license or certification issued pursuant to Title II are subject to exclusive federal regulation, and state measures in the field covered by the license are therefore preempted. Compare pp. 11-13, *infra* (discussing preemptive effect of different "operating requirements" issued by Coast Guard under Title I).

codified at 46 U.S.C. 3703(a), therefore, are preempted.[4] "The Supremacy Clause dictates that the federal judgment

[4] See provisions of Wash. Admin. Code § 317-21-200 (1999) (watch practices: manning); § 317-21-210 (engineering operating procedures: equipment and operations); § 317-21-215 (operating procedures, pre-arrival tests and designs: equipment and operations); § 317-21-230 (training: personnel qualifications); § 317-21-240 (personnel evaluation: personnel qualifications); § 317-21-245 (work hours: manning); § 317-21-250(1) (language proficiency: personnel qualifications); § 317-21-260(5) (maintenance: repair and alteration); § 317-21-265 (technology: equipment and operations).

The State asserts that it "waives" its drug testing requirements under Wash. Admin. Code § 317-21-235 (1999) when they conflict with a foreign country's requirements, but the affidavit they cite makes clear that the waiver is within the discretion of the enforcing official and is not required by state law. See J.A. 256. In any event, the State concedes that its requirements differ from federal regulations, see Wash. Br. 47-48, and does not deny that its rules have significant extra-territorial effects in ways not contemplated by Coast Guard regulations. See U.S. Br. 33-35. As to its event reporting rule (Wash. Admin. Code § 317-21-130 (1999)), the State makes no attempt to rebut the arguments in our opening brief (at 39-40) for why it is preempted and cites nothing in the memorandum of agreement between the State and the Coast Guard for why the sharing of information about events saves the unilateral state reporting rule.

that a vessel is safe to navigate United States waters prevail over the contrary state judgment." *Ray*, 435 U.S. at 165.

2. Respondents do not contest the continuing validity or applicability of this Court's decisions holding that the rights enjoyed under a federal navigation license may not be abridged by additional state requirements. *Ray*, 435 U.S. at 164 ("Congress did not anticipate that a vessel * * * holding a Secretary's permit, or its equivalent, to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States."); U.S. Br. 22 & n.9 (collecting cases).[5]

As this Court has observed in applying that rule in another federal licensing context: "A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress." *Sperry* v. *Florida*, 373 U.S. 379, 385 (1963) (footnote omitted). "No State law can hinder or obstruct the free use of a license granted under an act of Congress." *Ibid.* (quoting *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1852)).[6] Yet

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[5] *E.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 215 ("The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do—that is, to give permission to a vessel already proved by her enrolment to be American, to carry on the coasting trade."); *Harman* v. *Chicago*, 147 U.S. 396, 407 (1893) (rejecting city's imposition of license fee on tug operator because then "[t]he license of the United States would be insufficient to give him free access to those waters").

[6] See also *Railroad Transfer Serv., Inc.* v. *City of Chicago*, 386 U.S. 351, 358-359 (1967) (federal license for railroad transfer services cannot be supplemented or overridden by city ordinance); *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61, 64 (1954) ("[I]t would be odd if a state could take action amounting to a suspension or revocation of an interstate [motor] carrier's [Interstate Commerce C]ommission-granted right to operate."); *Barrett* v. *City of New York*, 232 U.S. 14, 31 (1914) (collecting cases).

the State's requirement of an "oil spill prevention plan" is tantamount to a state license, because no vessel may legally operate in state waters unless it has filed and received approval for such a "plan"; and that plan must in turn demonstrate compliance with the comprehensive state requirements, many of which operate in fields preempted by federal law or Coast Guard regulations. See Wash. Rev. Code § 88.46.080(1) (1996); see also, *e.g.*, Wash. Admin. Code §§ 317-21-200, 317-21-205, 317-21-210 (1999) (describing what operating, engineering, and navigational requirements must be satisfied in the "oil spill prevention plan").[7]

Respondents argue that the international treaties and agreements pursuant to which the Coast Guard recognizes and enforces such licenses for foreign vessels do not independently preempt state law. That argument is misplaced for two reasons. First, federal preemption under Title II arises from that Title's provision that a foreign vessel may not operate on the navigable waters of the United States without a federal certificate recognized and accepted by the Secretary. See 46 U.S.C. 3711; see also U.S. Br. 30-31.[8] In

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[7] Although the State now disavows any attempt to impede a vessel from actually entering its waters (Wash. Br. 5 n.5), it has not renounced the civil and criminal penalties called for under state law for vessels that do not comply with the BAP rules. See *id.* at 5. In *Harman*, this Court treated a city's "imposition of a fine" for noncompliance with local licensing rules as a basis for finding a preemptive conflict with federal licensing laws. See 147 U.S. at 406-407. Thus, any effort by the State to impose a requirement that impedes the exercise of rights enjoyed under the federal (or federally-recognized international) license would "den[y] to the vessel in question" the "full enjoyment of the right to carry on the coasting trade." *Sinnot* v. *Davenport*, 63 U.S. (22 How.) 227, 242 (1859).

[8] The State does not cite or discuss 46 U.S.C. 3711. Respondent-Intervenors do cite Section 3711, but misapprehend it, noting that it states that the "Secretary does not have to accept foreign certificates of compliance." Resp.-Int. Br. 45 n.35 (emphasis omitted). Section 3711

this Court noted that Title II of the PWSA "directs the Secretary to inspect tank vessels for compliance with the regulations which he is required to issue for the protection of the marine environment," and that "the consequent privilege of having on board the relevant cargo [is] evidenced by certificates of compliance issued by the Secretary or by appropriate endorsements on the vessels' certificates of inspection." 435 U.S. at 162-163. Respondents do not contest that SOLAS, STCW, MARPOL, and the ISM Code (which is a part of SOLAS) all require certifications that Congress has authorized the Secretary to accept on behalf of the United States. See 46 U.S.C. 3711(a); U.S. Br. 5-9 & n.5.

Second, respondents' contention (Wash. Br. 31; Resp.-Int. Br. 39-42) that the international agreements are not "self-executing" is irrelevant. The general provisions quoted and cited by respondents (Wash. Br. 30-31; Resp.-Int. Br. 41 & n.33), which provide that such international agreements must be given domestic legal effect, have been fully and completely complied with under United States domestic law. See U.S. Br. 7 (SOLAS), 8 n.4 (MARPOL), 9 (STCW), 37

affords the Coast Guard the opportunity to assess whether the certificate of compliance is valid and reflects the actual conditions aboard the vessel. If the Coast Guard has grounds for rejecting the certificate, it can take appropriate enforcement measures against the vessel. See <<*http://www.uscg.mil/hq/g-m/psc/psc.htm*>> (detailing, *inter alia*, Coast Guard month-by-month detentions of vessels, which flag nations have the best and worst records for detentions, and which vessels are in non-compliance with international conventions). The Coast Guard cannot deny entry to a foreign-flag vessel that fully complies with the certificate of compliance, because to do so would violate the terms of applicable international agreements. See U.S. Br. 7-9, 30-31. And a State may not in any event enforce the certification requirement. Respondent-Intervenors also mischaracterize 46 U.S.C. 3713, which prohibits the operation in U.S. waters of vessels that do not comply with federal regulations but which, by its plain terms, is not restricted to "construction and design characteristics," as respondents erroneously assert. See Resp.-Int. Br. 34 n.28.

(ISM Code).[9] Accordingly, "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement." *United States* v. *Pink*, 315 U.S. 203, 230-231 (1942).[10]

An illustration of the rule that the State may not impose a requirement that denies a right of a federal licensee is the BAP rule on personnel training. The State says that the United States "misunderstands this requirement" (Wash. Br. 45),[11] which by its plain terms requires "training beyond the training necessary to obtain a license or merchant marine document." Wash. Admin. Code § 317-21-230 (1999). Once a vessel has been duly licensed as complying with STCW requirements, a State has no power to impose any additional requirements on the federal license—even if all the State seeks to do is to doublecheck that the federal gov-

[9] Contrary to respondent-intervenors' assertion (Br. 42 n.33), the 1995 amendments to the STCW Convention have been implemented by federal law. On June 26, 1997, the Coast Guard issued an interim rule giving full legal effect to the 1995 STCW amendments for personnel serving on U.S. ships as of July 28, 1997. See 62 Fed. Reg. 34,506-34,541; see also *id.* at 5197-5199.

[10] The State asserts that it "has disclaimed power to 'control ships'" because it "directs its regulation at owners and operators to avoid conflict with the operative provisions of international law." Wash. Br. 31-32. The State cannot avoid preemption in that manner. The owners and operators "control" the ships the State seeks to regulate, and it is non-compliance by the vessel and its crew with substantive state requirements that causes the State to impose civil and criminal penalties against the owners and operators.

[11] According to the State, we also "misunderstand[]" the state rules regarding emergency procedures (Wash. Br. 44) and language proficiency (*id.* at 46). Although we disagree with that assessment, to the extent the state rules are susceptible to misinterpretation, they raise serious safety and environmental concerns for vessel operators, who may become confused over what rules to apply. That confusion will only proliferate if other States have the authority to override the national and international regime by imposing their own vessel requirements.

ernment's determination is correct. See p. 6, *supra*. Yet even by its own admission, the State's requirements go beyond STCW requirements. The STCW Code § A-II/2 provision requires personnel to have a requisite understanding of watch practices, uses of compasses, and corrections to errors in compasses, so that the officer in charge of the navigational watch may make necessary course corrections. See STCW Code § A-VIII/2(21.5.2, 34.2). The state BAP rules micro-manage the officer in charge by requiring frequent comparisons of compass readings, regardless of operating conditions and the potential to divert the officers and crew from other more pressing navigational duties. See Wash. Admin. Code § 317-21-205(3) (1999) (discussed at Wash. Br. 41). Precisely because of such differences in approach to training and certification, Congress determined that the national rule would be to accept the training and crew procedures certified under such agreements as the STCW and SOLAS, and to vest the Coast Guard with the power to implement and enforce those requirements. See U.S. Br. 7-8, 30-31, 35. Thus, with respect to those BAP rules that adopt, supplement, or seek to impose requirements in addition to those recognized to obtain a license or certification to operate in United States waters, they are preempted.[12]

3. The amici States point to a 1993 memorandum of agreement (MOA) between California and the Coast Guard as creating a "cooperative program for oil spill prevention and response." Amici States Br. 8. That MOA, however, is no longer valid. It has been superseded by a 1997 memoran-

[12] See provisions in Wash. Admin. Code § 317-21-215 (1990) (pre-arrival equipment tests: SOLAS certificate); § 317-21-220 (emergency procedure proficiency: STCW certificate); § 317-21-230 (crew training: STCW certificate); § 317-21-250(1) (language proficiency: STCW certificate); § 317-21-260(1) to (3) (management policies and practices: ISM Code certificate). See generally U.S. Br. App. 1a-17a.

dum of agreement, which the amici States allude to and which fully supports our submission in this case. Memorandum of Agreement on Oil Pollution Prevention and Response Between the Commander, Eleventh Coast Guard District, and the State of California (July 1997). Whatever ambiguity amici may perceive in the now-superseded 1993 MOA, the 1997 MOA reiterates that "[f]ederal inspection requirements associated with vessel safety are not subject to supplemental State regulations." *Id.* ¶ V.A.1. It further provides that "the State has the authority to promulgate regulations concerning oil spill prevention which do not conflict with, and which are not otherwise preempted by, Federal law." *Id.* ¶ X.A. Cooperative Federal-State efforts to respond to and contain oil spills are an important aspect of protecting the marine environment, but those efforts do not support the conclusion that federal vessel and operator regulations lack preemptive force over state rules on the same subjects.

B. A Coast Guard Regulation Issued Pursuant To Title I Of The PWSA, Or A Decision That There Should Be No Requirement At All, Preempts State Law

Title I of the PWSA, as amended by the PTSA, addresses "Vessel Operating Requirements." See 92 Stat. 1472; 33 U.S.C. 1223 (caption). The subjects addressed in that Title pertain to "operations" in the sense of navigating the vessel—the types of traffic safety rules this Court noted in *Ray*. See 435 U.S. at 161 & n.9. Congress enacted Title I in 1972 "to broaden the Coast Guard's authority to establish rules for port safety and protection of the environment." *Id.* at 169 n.20. As we have explained (see U.S. Br. 26-28), a federal regulation issued pursuant to Title I (or a Coast Guard determination that there should be no requirement at all on a subject) ousts a state rule on the same subject, whereas a state rule is valid in the absence of such a regulation or determination. See *Ray*, 435 U.S. at 171-172 (the "relevant inquiry" under Title I is "whether the

Secretary has either promulgated his own * * * requirement * * * or has decided that no such requirement should be imposed at all"); *id.* at 174 (quoting H.R. Rep. No. 563, 92d Cong., 1st Sess. 15 (1971) (Title I revised to "make it absolutely clear that the Coast Guard regulation of vessels preempts state action in the field").[13] Respondents do not cite a single case of this Court upholding a state navigation requirement when a federal rule addresses the same subject.

In an attempt to justify certain state rules as "necessitated by local conditions," the State defends its rule governing operation in restricted visibility (Wash. Admin. Code § 317-21-200(1)(a) (1999)) as compelled by the "congested waters of the Strait of Juan de Fuca and Puget Sound" (Wash. Br. 42). Yet by its terms the BAP rule applies throughout state waters. When promulgating its rule requiring two licensed deck officers on watch on the bridge, see 33 C.F.R. 164.13(c), the Coast Guard specifically intended the rule to apply in "all navigable waters of the U.S.," particularly in the congested waterways of the United States. 58 Fed. Reg. 27,630 (1993). The uniform application of that rule furthers compliance with the STCW crew rest requirements implemented domestically through 46 C.F.R. 15.1109, 15.1111, which are designed to prevent fatigued mariners from navigating vessels. The State, however, asserts the authority to impose a rule that overrides the STCW requirement (Wash. Br. 43), notwithstanding the contrary judgments by the Coast Guard and the members of the International Maritime Organization that a uniform re-

[13] For an example of the type of local traffic rule that would not be preempted, see Wash. Admin. Code § 317-21-205(4) (1999) (providing that "[a] master of a tanker carrying cargo shall use at least one assist tug for anchoring and departing anchorages in the port of Port Angeles. The port of Port Angeles includes all navigable waters west of 123 degrees, 24 minutes west longitude encompassed by Ediz Hook"). There is no Coast Guard regulation on that subject, see U.S. Br. App. 6a, nor any Coast Guard determination that there should be no such requirement at all.

gime enables a master to organize his crew rest schedule to avoid the hazards of a tired crew when vessels travel to multiple ports over a span of a few days.

A number of Washington State's BAP rules that appear to fall into the realm governed by Title I rather than Title II of the PWSA concern subjects also addressed by the federal rules.[14] Those BAP rules are preempted. By contrast, although certain of the equipment rules adopted by other States, which are featured by the amici States (Br. 6-9), might be preempted by applicable Coast Guard regulations, other state rules addressed to other matters would not be. In any future case challenging the validity of such rules in other States, the preemption analysis set out should be applied to analyze specific rules at issue.

C. Neither A State's Police Powers Nor Section 1018 Of The Oil Pollution Act Of 1990 Saves The Washington BAP Rules From Preemption Under The PWSA And International Agreements

Notwithstanding the foregoing provisions of federal law, respondents and their amici contend that two sources of law save Washington's BAP rules from preemption: inherent police powers and Section 1018 of OPA. Respondents are wrong on both counts.

1. This Court long ago rejected the first proposition—that the reserved powers of the States authorize them to

[14] See provisions of Wash. Admin. Code § 317-21-215(1)(a) (1999) (prearrival tests and inspections); § 317-21-540 (advance notice of entry) (discussed in Wash. Br. 43-44). It bears noting that, like the state restricted-visibility rule discussed in the text, these other BAP rules are not specifically directed to particularly problematic passageways in its waters, but rather apply throughout all state waters. Moreover, to the extent that provisions of Wash. Admin. Code §§ 317-21-130 (1999) (event reporting of marine casualties) and 317-21-235 (drug testing) are considered rules of local application, they also are preempted by the existence of federal rules. See U.S. Br. 33-34, 39-40.

regulate navigation, at least where Congress has taken the matter in hand:

> The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, [are] therefore but the exercise of an undisputed power. When, therefore, an act of the Legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State law must give way; and this, without regard to the source of power whence the State Legislature derived its enactment.

Sinnot v. *Davenport*, 63 U.S. (22 How.) 227, 243 (1859).

The amici States argue, however, that "local pollution control measures regarding tank vessels are no different from the local pilotage requirements sustained in *Cooley*." Amici States Br. 16. That contention is incorrect. First, as the *Cooley* Court itself noted, *Congress* by statute permitted States to impose local pilotage requirements; the state rule was not upheld as an exercise of inherent police power. See *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 315 (1852) (citing 1789 statute). Second, although the federal Clean Air Act (see 42 U.S.C. 7402, 7511b(f)) and Clean Water Act (see 33 U.S.C. 1314, 1342) do expressly provide a role for States in establishing certain anti-pollution rules that apply to vessels, those provisions do not override the congressional determinations established in the PWSA and PTSA that uniform *federal* standards shall apply to the "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning" of vessels (46 U.S.C. 3703(a)), and that the Secretary likewise may adopt preemptive navigation rules of national or local applicability to promote safety and protection of the marine environment (33 U.S.C. 1223(a) (1994 & Supp. III 1997)).

The State calls its navigation rules oil "spill prevention" requirements (Wash. Br. 12, 13, 38, 40, 42, 44), and the amici States assert that the vessel rules support the underlying purpose of pollution prevention (Amici States Br. 12-13). But those motivations do not alter the reality that the rules directly regulate vessels in navigation. In any event, a State's *reasons* for adopting such measures are irrelevant under the Supremacy Clause. See, *e.g.*, *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). And, in fact, this Court has rejected similar police-power rationales for state regulation of vessels. See, *e.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 53, 200-202 (rejecting argument that State's regulation is "nothing more than [regulation of] property * * * subject to the control of the sovereign power"); *Sinnot*, 63 U.S. (22 How.) at 242 (rejecting argument that state police power permits vessel licensing requirement where federal license rule exists); *Harman*, 147 U.S. at 408-409 (rejecting city's contention that license fee was justified to fund deepening of Chicago River). Indeed, in *Ray* the Court distinguished precisely the kinds of environmental rules upon which respondents rely (Wash. Br. 15; Resp.-Int. Br. 17-20) by noting that "in none of the relevant cases sustaining the application of state laws to federally licensed or inspected vessels did the federal licensing or inspection procedure implement a substantive rule of federal law addressed to the object also sought to be achieved by the challenged state regulation." 435 U.S. at 164 (citing, *e.g.*, *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960)). In *Ray*, as here, Titles I and II are designed to protect the marine environment, as well as to promote safety and protect life and property. See 33 U.S.C. 1223(a)(1), 1224; 46 U.S.C. 3703(a).[15]

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[15] Nor does *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973), support respondents' position. In *Askew*, the Court upheld a state rule imposing strict liability for an oil spill "from any waterfront

2. Respondents' reliance on Section 1018 of OPA is also misplaced. In our opening brief (at 44), we demonstrate, *inter alia*, that Section 1018 simply does not apply to this case because all of the preemptive federal rules at issue here derive from some source of law other than OPA. The State nonetheless contends that "[t]he language of subsections 1018(a) and (c) is very broad" (Wash. Br. 25) and that "[i]t would make no sense for Congress to express a broad savings of state powers from preemption in § 1018, if it had already preempted those state powers" (*id.* at 26). The State provides no support for that proposition in the text of OPA or any of this Court's decisions. Section 1018 provides only that "[n]othing in this Act"—*i.e.*, nothing in OPA itself—shall affect the authority of the States to impose certain requirements. 33 U.S.C. 2718. It in no way affects the preemptive effect of *other* Acts (such as the PWSA and PTSA), of international agreements, or of Coast Guard regulations issued under those Acts or to enforce those agreements. See U.S. Br. 44-45. The Conference Report on OPA expressly states that it "does not disturb the Supreme Court's decision in *Ray* v. *Atlantic Richfield Company*, 435 U.S. 151 (1978)," H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. 122 (1990),

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facility" or "any ship destined for or leaving such facility," *id.* at 327, in part because "[i]t is clear at the outset that the Federal Act does not preclude, but in fact allows," States to impose additional liability for oil spills, *id.* at 329. The United States, as *amicus curiae*, had expressed the view that separate vessel equipment requirements contemplated under state law would be preempted by recently promulgated Coast Guard regulations, see 71-1082 U.S. Br. at 30-35, but acknowledged that a direct conflict with state law had not been presented since the State had not yet issued regulations. Accordingly, the Court opined that "the question whether such [state] regulations will conflict with Coast Guard regulations * * * should await a concrete dispute under applicable Florida regulations." 411 U.S. at 337. What the Court actually decided in *Askew*—that States may impose additional *liability* requirements for oil spills—is a proposition with which no party to this litigation disagrees.

which confirmed the preemptive effect of Title II of the PWSA and of Coast Guard regulations issued under Title I.[16]

The State attempts to explain away the Conference Report's affirmation of *Ray* by asserting that "[t]he reference to *Ray* in the Conference Report confirms only that the broad language of § 1018 does not undo the careful holding in *Ray* that the field of tanker design and construction is preempted." Wash. Br. 27. Having misstated the holding in *Ray* (see U.S. Br. 24-28; pp. 2-4, *supra*), the State then imputes that misunderstanding to the Conference Committee that inserted Section 1018. But Congress's intent not to "undo" *Ray* must include the aspects of the decision in *Ray* addressing the field-preemptive effect of Title II of the PWSA and the preemptive effect of Coast Guard regulations addressing other subjects under Title I of the PWSA.

Unlike respondents, the court of appeals recognized that Section 1018 by its terms does not apply to the PWSA or other statutes that confer authority on the Coast Guard to issue regulations that preempt state law. See Pet. App. 11a-12a. The court nevertheless held that Section 1018 of OPA, as Congress's most recent statute in the field, divests the Coast Guard of that authority under other statutes. *Id.* at 15a-16a. Respondents make no effort to defend that startling proposition, which cannot be reconciled with the bedrock principle that Congress can change the law only by passing a new law. See U.S. Br. 44. Nor do respondents

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[16] The legislative history of OPA quoted by the State (Wash. Br. 26-29) similarly shows only that Congress did not intend for OPA to preempt state law in certain respects. Nothing in any of the legislative history cited by respondents evidences any intent by Congress that Section 1018 would negate the preemptive scope of rules promulgated pursuant to the PWSA or PTSA, which are intended to further environmental protection as well as vessel safety. And contrary to respondent-intervenors' contention (Br. 31 n.23), the statements of Coast Guard officials it quotes in no way suggest that OPA freed States to adopt rules that conflict with Coast Guard regulations.

contest the applicability of this Court's decisions holding that savings clauses should not be read to conflict with directives in federal statutes. See *id.* at 45 n.20 (collecting cases). Thus, there is no occasion here for the Court to attempt to resolve the differences among the other parties over whether Section 1018 applies only to Title I of OPA or only to financial requirements. It is sufficient in this case for the Court to hold that the phrase "[n]othing in this Act" means what it says and that Section 1018 therefore does not trump the preemptive power of *other* extant federal laws.

3. The State contends that some of its BAP rules incorporate applicable Coast Guard regulations and international treaty provisions and therefore should not be deemed preempted because they are "identical" to those standards. See Wash. Br. 19, 44 (citing *California* v. *Zook*, 336 U.S. 725 (1949)). In *Zook*, the Court upheld a state law prohibiting the sale or arrangement of any transportation over a state highway if the transporting carrier lacked a permit from the Interstate Commerce Commission. The *Zook* Court based its decision in part on the absence of any intent by Congress for the federal law to be exclusive, while noting at the same time that "if a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down." 336 U.S. at 728. Unlike in *Zook*, that situation is manifestly present here, in light of the comprehensive national and international regime regarding vessels that this Court specifically recognized in *Ray*. And even as to regulations promulgated under Title I, Congress intended that there be one *decisionmaker*, even when national uniformity was not required. See *Ray*, 435 U.S. at 177. Moreover, the State asserts the authority to apply its own enforcement standards to its allegedly identical substantive rules, and thereby impose civil fines and criminal punishments on violators. See Wash. Br. 5. But because state officials do not have the authority to enforce national and international standards—only the Coast Guard has been granted such

authority (see U.S. Br. 8)—such unilateral actions by state officers threaten to impair the Nation's international obligations. See Belgium *et al.* Amici Br. 4; Canada Amicus Br. 5.

Moreover, the *Zook* Court emphasized that the subject of the state rules—"to enforce safety and good-faith requirements for the use of its own highways"—was within "the state's normal power." 336 U.S. at 737. As we demonstrate (U.S. Br. 18-23) and as was recognized by the district court (Pet. App. 61a), regulations of vessels in interstate or international navigation are traditionally a matter of national concern. In numerous other cases, the Court has held that identical or supplemental state laws are preempted by federal law.[17] In any event, respondents never contest our central thesis for conflict: that the international regime requires uniformity in vessel and staffing requirements (and in aspects of navigation regulated by the Coast Guard under Title I that are enforced by national officers). That regime is frustrated by the efforts of the several States of the United States to enforce their own rules.

4. The detailed international and federal statutory and regulatory regime enforced by the Coast Guard has produced significant benefits to the marine environment of the United States. Since the *Exxon Valdez* disaster, the aver-

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[17] See, *e.g.*, *Bethlehem Steel Co.* v. *New York State Labor Rel. Bd.*, 330 U.S. 767, 776 (1947) (identical state rule preempted by federal rule where exercise of concurrent jurisdiction means that enforcement "action by [state agency] necessarily denies the discretion of the [federal]"); *Missouri Pac. R.R.* v. *Porter*, 273 U.S. 341, 346 (1927) (state rule "cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction"); *Southern Ry.* v. *Railroad Comm'n*, 236 U.S. 439, 447-448 (1915) (virtually identical state requirement on railroads held preempted by federal rule). *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963), which the amici States cite (Br. 21), is inapposite, because in that case the state and federal standards were dissimilar.

age number of oil spills of more than 10,000 gallons has dropped by approximately 50%; the ratio of gallons spilled per million gallons of oil shipped has decreased by 50% (from ten to five gallons spilled per million shipped); and there have been no major oil spills of more than one million gallons from vessels since 1990. U.S. Dep't of Transp., *Ten Years Later: Oil Spill Prevention and Response in the United States, 1989-1999*, at 8 (1999). The comprehensive federal regime, which applies uniformly to vessels moving in international and interstate commerce, confirms the wisdom of the longstanding national and international approach to vessel safety. By contrast, "it is almost impossible for [the master] * * * to acquaint himself with the laws of each individual State he may visit." *The Roanoke*, 189 U.S. 185, 195 (1903) (invalidating State of Washington lien law applied against vessels).

* * * * *

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 1999

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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GARY LOCKE ET AL.

INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

v.

GARY LOCKE ET AL.

On Writ Of Certioarri To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI PUGET SOUND STEAMSHIP OPERATORS ASSOCIATION AND CHAMBER OF SHIPPING OF BRITISH COLUMBIA IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI[1,2]

A. *Amicus*, Puget Sound Steamship Operators Association ("PSSOA"), is a nonprofit, membership, trade association headquartered in Seattle, Washington. Its membership is comprised of 33 maritime companies which own, operate or are agents for all types of vessels serving the State of Washington and the Pacific Northwest, including container ships, break bulk vessels, passenger ships, general cargo vessels, auto carriers, tugs, petroleum tankers, etc.

PSSOA member companies service, represent or operate cargo vessels that make approximately 2,300 voyages each year to Washington ports on Puget Sound, Washington's main estuary, and to Grays Harbor on its Pacific Coast, comprising approximately 75% of all cargo vessels calling those ports. PSSOA vessels handle about U.S. $58 billion of trade in-bound to consignees in the United States, Canada and elsewhere or out-bound to foreign ports, primarily in Asia. Port of Seattle trade statistics show the State of Washington ranks as the number three state in the Union in maritime international trade in terms of dollar value.

Related specifically to oil carriage, PSSOA members represent about 90 tank ships, making approximately 237 voyages per year to, from, or in Puget Sound. Over half

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[1] Consent to file this brief in support of the United States and Intertanko was obtained from all parties.

[2] This brief was authored in whole by counsel for *amici curiae* and no party other than amici have made a monetary contribution to its preparation or submission.

of these voyages are by U.S. flagged tankers. All tankers, wherever flagged, call at five major oil refineries located in the ports of Ferndale, Anacortes or Tacoma, or at product terminals at Manchester or Seattle's Harbor Island, all situated on Puget Sound in the State of Washington.

PSSOA's mission is to promote growth and development of marine commerce in Puget Sound, Grays Harbor and other ports through strong business leadership that encourages sustained maritime trade in concert with modern principles of environmental stewardship. PSSOA, seeking to maintain a competitive balance, strives to eliminate factors unreasonably or unnecessarily increasing costs and complexities of transacting maritime business in Washington.

PSSOA works closely with other trade associations serving similar vessels calling at ports in British Columbia via the Strait of Juan de Fuca and at ports on both the Oregon and Washington side of the Columbia River, which divides the two states. Some vessels call at Oregon, Washington and Canadian ports on the same voyage.

B. *Amicus*, the Chamber of Shipping of British Columbia ("CSBC") is a nonprofit, membership association headquartered in Vancouver, British Columbia, whose geographic service range includes all maritime or saltwater operating areas of that Province. Membership is comprised of approximately 133 maritime companies which own, operate or act as agents for all types of vessels serving British Columbia, including container ships, break bulk vessels, passenger ships, tugs, general cargo vessels, auto carriers, petroleum tankers, etc.

CSBC member companies service or operate vessels that make about 3,000 voyages each year to British Columbia ports, comprising the majority of all cargo vessels calling at those ports. CSBC vessels handle about Can. $60 billion of trade in-bound to consignees in Canada, the United States and elsewhere, or out-bound to foreign ports, primarily in Asia.

Relating specifically to oil carriage, CSBC's members represent the interests of about 140 tank ships, making approximately 500 voyages per year to or from British Columbia via the Strait of Juan de Fuca. Such tank vessels call at the British Columbia ports of greater Vancouver and Kitimat.

CSBC's mission is to liaison with all levels of government, promote growth and trade in British Columbia and seek to reduce or eliminate unnecessary complexities and unreasonable costs of transacting maritime commerce in the Province, while complying with applicable legislation.

The Bilateral Agreement, between the United States and Canada, directs that any sizeable vessel intent on calling on ports in either Puget Sound or southern British Columbia must necessarily first transit "Washington waters," being that portion of the 12-mile wide, 65 mile long, Strait of Juan de Fuca lying south of the mid-channel international boundary. *See* Chartlets attached as Appendices A & B for geographic reference.

Because the State of Washington is claiming authority to regulate any tank vessel transiting its waters even though such vessels otherwise meet all United States,

Canadian or international operational, personnel qualification, drug testing and manning requirements, each association has a vital interest in the outcome of this appeal.

SUMMARY OF ARGUMENT

Amici believe that the Circuit Court erred, in holding that while the non-preemption language in Title I of the Oil Pollution Act of 1990 ("OPA 90") applied only to the provisions of that Act, it was applicable to all of its Titles and, as the most recent federal statutory expression in the field, evidenced the "overarching purposes" of Congress to refrain from preemption in its prior legislation.

Amici argue that certain of the Washington BAP rules going beyond regulation of tanker design, construction and equipment are also preempted by federal law because they frustrate the accomplishment of the full purposes and objectives of Congress, which prior to OPA 90 had established a single national regulatory scheme that is tied to an international regime to which the United States is committed.

Additionally, *Amici* urge that the Washington rules are clearly preempted to the extent that they interfere with rights of innocent passage in United States territorial waters and/or disregard the Bilateral Agreement between the United States and Canada governing vessels transiting United States/Washington and Canadian waters in the Strait of Juan de Fuca, but bound solely for Canadian ports.

ARGUMENT

A. Non-Preemption Language of § 1018 of OPA 90 Has Limited Effect.

Amici agree with Intertanko that § 1018 of OPA 90, 33 U.S.C. § 2718, applies only to Title I of that Act, and is therefore limited in its application to non-preemption of state laws solely concerning oil spill liability, response and penalties. Section 1018 was not intended to apply to the other eight Titles of OPA nor to leave states and political subdivisions free to broadly legislate "prevention provisions," such as those adopted in Washington's BAP rules.

The legislative history supporting this conclusion will no doubt be thoroughly briefed and set forth by Intertanko, and is ably summarized in Judge Grayber's dissent to the Ninth Circuit's denial of Petition for Rehearing reported at *Intertanko v. Locke*, 159 F.3d 1220 (9th Cir. 1998). However, in legislative history not mentioned by the Ninth Circuit, the Legislative Conference Committee announced that it intended the Coast Guard to look to the STCW Convention in setting the manning, training, qualification and watchkeeping standards for foreign tank vessels. Additionally, the Conference Report on OPA expressly states that OPA "does *not* disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978)." H.R. Conf. Rep. No. 101-653, 101st Cong., 2d Sess. 122 (1990) (Emphasis added).

The conclusion that Title I's two non-preemption clauses do not apply to Title IV's prevention provisions is reinforced by the fact that Title IV of OPA 90 contains its

own limited non-preemption clause.[3] *See* § 4202(c) codified at 33 U.S.C., § 1321(o)(2). As Judge Grayber properly concluded, no need for additional non-preemption clauses would exist if the clauses in Title I relied upon by the State were intended to be comprehensive. 159 F.3d at 1222-23.

A final point which has not been emphasized is that the language of the non-preemption clauses of § 1018 allow "any state or *political subdivision thereof*" (emphasis added) to impose additional requirements. There are scores, if not hundreds, of counties, cities and port districts within the State of Washington which are adjacent to navigable waters. An interpretation allowing each of them to enact their own specific, unique and different "prevention" ordinances and rules, under the guise of Title IV of OPA 90, would prove disastrous. It would inevitably lead to conflicts and chaos in the field of tanker regulation and create such a byzantine regulatory scheme as to make it impossible for responsible tanker operators to comply with each "political subdivision's" unique requirements. This could not have been the intent of Congress.

Comparing the effect of the Ninth Circuit's decision in tanker regulation with federal control in the aviation industry, one commentator has stated:

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[3] "Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the *discharge of oil* or hazardous substances within any waters within such State, *or with respect to any removal activities related to such discharge.*" (Emphasis added).

> It is scarcely imaginable that state and municipal authorities would be permitted to start dictating aircraft safety and operations standards for airlines calling at various international airports, yet this is precisely what is being done by the State of Washington for maritime tank vessel operations.

Charles Coleman, *Sea Trials: District Court Ruling Alters Balance Between State, Federal Cleanup Roles,* J. Comm., February 3, 1997 at 1.

B. National Regulatory Scheme is Controlling.

By basing all of its non-preemption arguments on the language of § 1018 of OPA 90, the State impliedly concedes that, but for the enactment of that section, prior national legislation and regulations would have preempted its attempt to publish and enforce its BAP rules.

Prior to *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, (1978) ("*Ray*"), federal regulation of tanker safety and environmental protection primarily rested with the Ports and Waterways Safety Act ("PWSA"). Pub. L. No. 92-340, 86 Stat. 424 (1972). The PWSA contained two titles. Title II of the PWSA directed the Secretary [of Transportation] to "prescribe regulations for the design, construction . . . operation, equipping, personnel qualification, and manning" of tank vessels "that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." Now codified as 46 U.S.C. § 3703(a). Title II used mandatory language and directed that in developing those standards, the Secretary

must consult with and consider the views of (1) interested federal agencies; (2) officials of State and local governments; (3) representatives of port and harbor authorities and associations; (4) representatives of environmental groups; and (5) other interested parties knowledgeable or experienced in dealing with problems involving vessel safety, port and waterways safety, and protection of the marine environment. 46 U.S.C. § 3703(c).

Each tank vessel of the United States was required to have a certificate of inspection issued and endorsed [by the Secretary] to indicate that the vessel complied with federal regulations prescribed under that Chapter. 46 U.S.C. § 3710(a). Congress provided that each foreign flag tank vessel must have a certificate of compliance issued by the Secretary, but that the Secretary may accept a certificate "issued by the government of a foreign country under a treaty, convention or other international agreement to which the United States is a party," as the basis for his issuance of a certificate of compliance with federal requirements. 46 U.S.C. § 3711(a).

In *Ray, supra,* this court held the State of Washington's attempt to regulate the design of oil tankers was preempted, concluding that by enacting Title II of the PWSA, 46 U.S.C. § 391(a), codified as amended, at 46 U.S.C. § 3701 *et seq.*, Congress had "entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States." 435 U.S. at 163. This Court admonished that, "[t]he Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevails over the contrary state judgment." *Id.* at 165. It also noted that Congress had

"expressed a preference for international action." *Id.* at 167. At the time of the *Ray* decision, there were no pertinent Coast Guard regulations relating to tug escorts, but the decision emphasized that if the Coast Guard adopted regulatory requirements governing the subject, a state's inconsistent rules would be preempted by operation of the Supremacy Clause. *Id.* at 171-172.

Close examination of *Ray* reveals that this Court's discussion of the Washington tug escort rule characterized that rule as "an operating rule *arising from the peculiarities of local waters* that *call for special precautionary measures.*" *Id.* at 171. (Emphasis added). The contrast to the present case is important. Internal vessel "operating" rules regarding activities such as crew member qualifications, drug and alcohol testing, crew rest periods, ship management systems, mandatory plotting and officer English proficiency, are properly subjects for national rules issued under Title II of the PWSA. By contrast, need for a local harbor pilot in the Port of Philadelphia,[4] and the need to control ballast water in Alaska[5], are not.

Washington BAP regulations are to be measured against a "best available protection" standard and are to be applied throughout *all* Washington waters, including the boundary waters of the Columbia River, the coastal waters of the Pacific Ocean, the boundary waters of the Strait of Juan de Fuca and the inland waters of Puget Sound. These regulations therefore are *not* operating rules

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[4] *Cooley v. Board of Wardens,* 53 U.S. (12 How.) 299, 321 (1851).

[5] *Chevron U.S.A., Inc. v. Hammond,* 726 F.2d 483 (9th Cir. 1984).

arising from the "peculiarities of local waters," which *Ray* indicated could withstand preemption. 435 U.S. at 171. The Ninth Circuit's conclusion misreads the claimed basis for the Washington BAP regulations and begs the question of whether the BAP regulations are "in reality based on water depth in Puget Sound or some other local peculiarities," 435 U.S. at 175, or are simply premised upon the non-constitutional foundation that "Washington's navigational waters are treasured environmental and economic resources," as set forth in R.C.W. § 90.56.005(3)(c) and relied upon so heavily in the State's briefing.

Since *Ray*, the subject matters and breadth of tanker vessel regulations and requirements mandated by Congress have expanded dramatically. Approximately, eight months later in 1978, the PWSA was enlarged by the Port and Tanker Safety Act (PTSA) Pub. L. No. 95-474, 92 Stat. 1471 (1978), which largely reissued the PWSA and stipulated further design, equipment, operational, personnel, manning, and training requirements for United States and foreign tankers operating in United States waters. Broad authority was imparted to the Secretary to regulate tankers by the legislation, which states emphatically that the Secretary:

> *shall prescribe* regulations for the design, construction, alteration, repair, maintenance, *operation*, equipping, *personnel qualification and manning* of vessels to which this chapter applies; that may be necessary for increased protection against the hazards to life and property, for navigation and vessel safety and for enhanced protection of the marine environment.

46 U.S.C. § 3703(a) (Emphasis added).

In 1983, Congress enacted Subtitle II of Title 46, United States Code, which codification included existing provisions of Title II of PWSA and detailed the expansive statutory provisions governing marine safety and environmental protection, wherein the Secretary is accorded broad powers of superintendence over the merchant marine and authorized to prescribe regulations to carry out the provisions of the law. 46 U.S.C. § 2103. The Secretary proceeded to do so. Accordingly, it is clear that, under the federal regulatory scheme existing prior to the enactment of OPA 90, Washington's BAP rules, if enacted, would have been preempted and invalid.

The United States and Intertanko have outlined the pervasive federal regulatory structure put in place by the national government as composed of federal statutes, Coast Guard regulations, treaties and executive orders, addressing tanker safety and marine environmental protection, making full repetition here unnecessary. The four principal federal statutes are the Ports and Waterways Safety Act ("PWSA"), the Port and Tanker Safety Act ("PTSA"), the Tank Vessel Act and the Act to Prevent Pollution From Ships.

In 1995, the State of Washington made its BAP Regulations effective, detailing restrictions on the manning, training, operation and personnel qualifications of crewmembers and oil tankers transiting Washington waters. These requirements are accurately summarized in Part I of the Court of Appeals decision, *Intertanko v. Locke*, 148 F.3d 1053, 1057-1058 (9th Cir. 1998). *See also* Appendix K

to Intertanko's Brief on Petition for Certiorari.[6] The State's rules go well beyond national and international requirements, have an extraterritorial impact, contradict treaty obligations, have an adverse effect on foreign relations, and undermine reciprocity with other countries.

Failure to comply with BAP regulations would subject tanker owners to the following: (1) assessment of civil penalties, *see* R.C.W. § 88.46.090; (2) criminal prosecution, *see* R.C.W. § 88.46.080; and (3) denial of entry into state waters, *see* Wash. Admin. Code § 317-21-020.

When the *Intertanko* litigation reached the Ninth Circuit, that Court invalidated Wash. Admin. Code § 317-21-265 requiring certain radar and global positioning system receivers and specialized towing equipment, concluding these requirements were preempted under its reading of *Ray*. However, the Court held that the additional BAP regulations were not preempted because of § 1018 of OPA 90 (33 U.S.C. § 2718). The Court found that the non-preemption language of § 1018 specifically applied only to OPA 90 ("the Act"), but nevertheless concluded that "as the most recent statute in the field," § 1018's savings provisions reflected "the *full* purposes and objectives of Congress better than PWSA, PTSA or the Tank Vessel Act, all of which OPA 90 was designed to complement." (Emphasis added). *Intertanko*, 148 F.3d at 1062.

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[6] That Appendix sets forth a comparison of the federal statutes, regulations and international maritime obligations of the United States with all the BAP regulations to illustrate the relationship and overlap between the federal system and the BAP regulations.

The Court further stated that § 1018 "demonstrates Congress's willingness to permit state efforts in the areas of oil spill prevention, removal, liability and compensation," 148 F.3d at 1062, relying heavily on its earlier decision of *Chevron U.S.A. Inc. v. Hammond*, 726 F.2d at 493, 494 (hereafter "*Hammond*.")

C. *Hammond's* Analysis is Flawed.

One troubling aspect of the Ninth Circuit's decision in *Hammond*, at least for maritime and international law practitioners, is that it ignored the admonition in *Ray* concerning the effect of conflicting federal regulations and concluded that international agreements set only "minimum" standards. 726 F.2d at 493. Hence, Washington or any state would be free to adopt additional requirements. Amici contend the Court misunderstood the Supremacy Clause analysis (U.S. Const. art. VI, cl. 2) for treaties and understated the commitment of Congress and the President to the adoption and enforcement of uniform international standards for merchant vessel safety and vessel-source pollution prevention. By virtue of the supremacy of federal law, "no state can add to or take from the force and effect of [a] treaty." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

Additionally, the Court's decision in *Hammond* failed to recognize the difference between the federal government excepting to specific provisions of a treaty, as a foreign affairs policy choice, and a state government's unilateral enactment of laws that conflict with a treaty which the federal government has ratified and to which it is bound.

D. The United States Must Speak With One Voice.

Power over external affairs is not shared by the states, it is vested in the national government exclusively. *United States v. Pink*, 315 U.S. 203, 233 (1942). This Court has recognized that "in international relations and with respect to foreign intercourse and trade, the people of the United States act through a single government with unified and adequate national power." *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933), *quoted in Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979).

The reason for requiring this country to speak with one voice in maritime affairs is clear. The result of the Ninth Circuit's *Intertanko* decision could be catastrophic on tanker operators transiting Washington waters to call either at Washington ports or only at ports in British Columbia or Oregon. If upheld, such a ruling will undoubtedly encourage a trend promoting regulatory activism by each coastal state at the expense of international and interstate concerns of uniformity and consistency in shipping and commerce. Such action directly conflicts with the historical position articulated by this Court in *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924), which struck down a federal statute granting to injured longshoremen "the rights and remedies under the Workmen's Compensation Law of any state," observing:

> The confusion and difficulty if vessels were compelled to comply with the local statutes at every port are not difficult to see. Of course, some within the States might prefer local rules; but the union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The

> subject is national. Local interests must yield to the common welfare. The constitution is supreme.

Id. at 228.

To the same effect this Court has further stated:

> Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.

Hines, 312 U.S. at 63.

The consequences are frightening if this Court should determine that language of § 1018 allowing states to enact laws relating to "substantial threat of discharge" permits enactment of non-federal regulations pertaining to tanker operations, manning, training, drug testing, etc. (the PTSA subject matter) by any "political subdivision thereof." *See* 33 U.S.C. §§ 2718(a) and (c). As mentioned, the State of Washington has scores, if not hundreds, of political subdivisions adjacent to its state waters, all of which could claim the same interest in spill prevention and environmental protection,[7] as now claimed by the State. Of course, the same legislative chaos created by action of Washington's political subdivisions would likewise be threatened by agencies in other coastal states, which is the real danger of such a broad interpretation of OPA 90's non-preemption language.

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[7] *See* Historical Case Law Example, Appendix C.

E. Treaties and International Actions.

1. *General Observations.* The most striking point that emerges from the briefs previously filed by the State and its supporters is the lack of concern for the foreign relations problems raised by the BAP rules. State legislation which affects foreign commerce and foreign relations is subject to stricter scrutiny than are state laws affecting only interstate commerce. *See South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 n.7 (1984); *Wardair Canada v. Florida Dept. of Revenue*, 477 U.S. 1, 7-8 (1986); *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 194 (1983) (distinguishing between the "one voice" constraint imposed by the foreign affairs clause and Article VI supremacy "preemption" analysis).

Stricter scrutiny was not supplied by the Ninth Circuit. Rather, the *Intertanko* decision indicates that the court did not examine applicable United States treaties to determine whether they manifested an intent to displace non-uniform state or local laws.[8] By concluding that all relevant congressional purposes and objectives were embodied in OPA 90, and that nothing therein would be frustrated by the BAP regulations, the court avoided the need to properly analyze and consider legislative or foreign policy objectives that Congress and the President have sought to obtain through numerous international

[8] For example, had the court examined the SOLAS and STCW conventions, it would have found that each limits the extent to which parties to the convention may enact additional laws on the subject.

agreements: the SOLAS, MARPOL, and STCW Conventions, and the various other Treaties on Friendship, Commerce and Navigation, and the LOS Convention.[9]

Instead, the Ninth Circuit cut short its analysis and uncritically applied *Hammond*'s sweeping generalization that international agreements set only "minimum standards," despite critical differences between the underlying treaty provisions involved in this case. It appeared to confuse the question of whether uniform international laws are wise or necessary (a policy question) with whether a treaty to which the U.S. is a party is the Supreme law of the land (an Article VI question).[10]

The difference between the effects of treaties and statutes is critical. Absent an exception or reservation by the President at the time of ratification or accession, or treaty language permitting local variation among political subdivisions of the parties, a treaty presumptively binds the entire nation, or it is not binding at all. *See United States v. Belmont*, 301 U.S. 324, 331 (1936).

2. *Innocent Passage.* Another foreign relations concern involves the internationally recognized doctrine of "innocent passage," by which ships of all countries are free to pass through territorial seas (as opposed to internal waters of coastal nations). While coastal nations may

[9] *See* Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States* (Part III), 30 J. Mar. L. & Com. 85, 135 (1999).

[10] Allen, *supra*, at 130.

adopt laws related to the preservation of the environment, laws regarding design, construction, equipment and manning of foreign ships are precluded unless they give effect to generally accepted international standards. In various statutory provisions, Congress has explicitly recognized and accepted the internationally recognized innocent passage doctrine which restricts our domestic regulatory powers, but is central to United States Navy operations in foreign territorial waters. *See* 33 U.S.C., § 1223(d); 46 U.S.C. § 3702. The Washington ƃAP rules contain no exception for vessels in innocent passage.[11]

3. *International Treaties.* Intertanko and the United States substantially rely on four international agreements: SOLAS; MARPOL – 73/78, including its Annex I; STCW and COLREGS. Intertanko Petition for Writ of Certiorari at 8-9, (No. 98-1706). Each has been signed, ratified, executed and implemented by this country, and each is by operation of Article VI of the United States Constitution

[11] Owners and Masters of vessels transiting through Washington Waters in Innocent Passage or in passage to or from a port in Canada now face two major concerns over the Washington BAP regulation. The first is the potential tort liability that may flow from a failure to comply with applicable state regulations. The tort liability risk arises without regard to whether the State of Washington actually enforced its regulations against such vessels. Second, Washington has made it clear that it intends to enforce its tanker regulations against vessels passing through its waters en route to Canadian ports in British Columbia. Washington's BAP regulation of vessels transiting through U.S./Washington waters en route to British Columbia ports conflict with the U.S./Canada Agreement for Cooperative Vessel Traffic Management System for the Juan de Fuca Region (VTMS Agreement); *See Intertanko*, 148 F.3d at 1064, at n. 9.

"the Supreme law of the land." Under each of these international conventions, our national government has undertaken or acknowledged certain obligations which establish safety standards in such areas as tanker design, construction, equipment, staffing and operations.

The concept of reciprocity is critical in maintaining enforcement of uniform international standards. The United States will accept flag state certification of compliance with requirements concerning such matters as seafarer qualification and training, in exchange for other countries' acceptance and recognition of certification by our federal government that a U.S. vessel complies with the same international standards. United States Petition for Writ of Certiorari at 3 n. 2, (No. 98-1701); *see also* 46 U.S.C. § 3303(a) and 46 U.S.C. § 1903(b). Certification powers lie with the signatory nations which, in this country, is through powers delegated to the United States Coast Guard. Individual states or political subdivisions have no such power, although Washington's BAP regulations purport to be contrary.

The STCW Convention was substantially amended in 1995 to prescribe extensive requirements for officer and crew training, certification, watchstanding practices, rest periods and voyage planning.[12] This Court in *Ray* explained its prior decisions upholding "reasonable, nondiscriminatory conservation and environmental protection measures," noting that none of its earlier cases sustaining the application of state laws to federally licensed

[12] *See* footnote 8.

or inspected vessels involved an "overlap" between federal and state laws. *Ray*, 435 U.S. at 164.

The overlap between the state BAP regulations and international treaty standards being obvious in this case, it was inevitable that the Ninth Circuit would be called upon to revisit its conclusion in *Hammond*. The overlaps here go far beyond the single ballast water regulation and MARPOL, Annex 1, at issue in *Hammond*. That decision strongly suggested that IMO Conventions set only "minimum standards," which individual states within the United States were free to exceed. However, this Court, in *Ray*, rejected the State's argument that because Title II of the PWSA purported only to establish "minimum" standards, the states were free to enact more stringent requirements concerning tanker construction and design. Instead, this Court held that a state law on the same subject would at least "frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime." *Ray*, 435 U.S. at 165. Nevertheless, the Ninth Circuit, in *Intertanko*, upheld BAP regulations that varied significantly from international requirements prescribed by the STCW Convention and the ISM Code.

The strong implication in *Hammond*, as carried forward by the Ninth Circuit in *Intertanko*, would permit individual states to freely and haphazardly adopt more stringent regulations than those carried forward in various maritime treaties. This threatened the status of those treaties as the controlling law of the land in the United States and came as a shock to other nations. Thirteen

maritime nations[13] and the Commission of the European Community protested the Washington BAP regulations, warning that different regimes in different parts of the United States create uncertainty and confusion for foreign vessels and set an "unwelcome precedent" for other federally-administered nations. *See* Brief for Intervenor-Appellant United States, *Intertanko*, 148 F.3d 1053 (9th Cir. 1998). Where the federal government acting in the unique area of tanker regulation has through treaties, international agreements, plus federal statutes and regulations, crafted a balanced, tailored approach to the issue, any state regulations which threaten to upset that balance are preempted under the Supremacy Clause. *See National Foreign Trade Council v. Natsios*, 181 F.3d 38, 77 (1st Cir. 1999).

4. *Bilateral Agreement with Canada.* Of more specific concern to the interests of CSBC members are the reciprocal provisions of the 1979 Bilateral Agreement between the United States and Canada. (T.I.A.S. 9706, 32 U.S.T. 377 – The Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region). ("VTMS Agreement"). The United States had long recognized as a matter of international law, a foreign vessel's right of transit passage through international straits, such as the Strait of Juan de Fuca.

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[13] The protesting nations are Belgium, Denmark, Finland, France, Germany, Greece, Italy, Japan, The Netherlands, Norway, Portugal, Spain and Sweden.

The 1979 VTMS Agreement with Canada governs vessels operating in the Strait of Juan de Fuca, which is the northwest strait that forms the western boundary between the United States and Canada. Among other things, it set vessel traffic lanes and intervening buffer zones, requiring incoming vessels to stay on the United States/Washington side of the mid-channel boundary.[14] *See* 33 U.S.C. § 1230(b). Pursuant to the Congressional grant of authority in the PWSA, the Coast Guard may waive United States requirements for vessels transiting United States waters and bound for Canada if United States vessels are accorded similar treatment while transiting Canadian waters. 33 U.S.C. § 1230(c). Canada has granted reciprocal privileges and, subsequently, each has waived the other's requirements.

The BAP rules contain no exception for vessels in the United States portion of the Strait bound for Canadian ports and clearly conflict with the provisions of the VTMS Agreement.[15] The BAP rules essentially strip Canadian bound vessels of the benefits of the Bilateral Agreement. *Coleman, J. Comm., supra. See also* Hypothetical Incident, Appendix D.

The Ninth Circuit declined to reach the Bilateral Agreement preemption question, indicating that the State had not had the opportunity to develop "the record"

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[14] *See* Chartlets attached as Appendices A & B.

[15] *See* Footnote 11.

concerning whether its BAP regulations conflicted with the Bilateral Agreement.[16]

The government of Canada has strongly protested the application of Washington's BAP rules to international traffic moving through the Strait of Juan de Fuca en route to Canadian ports as violative of the Bilateral Agreement. (T.I.A.S. 9706, 32 U.S.T. 377). Canada's protest that Washington's actions violate the VTMS Agreement certainly presents a foreign relation challenge to the Washington BAP rules. Additionally, the State's action in unilaterally asserting its own BAP regulations initially caused,[17] but hopefully will not continue to encourage, unsafe practices.

The Ninth Circuit's *Intertanko* decision fails to accord the Bilateral Agreement its preemptive effect under Article VI of the Constitution. Even its broad reading of § 1018 of OPA 90 saves laws of the various states and their political subdivisions from preemption only from the conflicting provision of OPA 90. As such, § 1018 cannot save the Washington regulations from preemption

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[16] As Professor Allen stated in the third of a four-part article on merchant vessels appearing in 30 J. Mar. L. & Com., 85, 134 (1999):

> The state's complaint about the need to develop a 'record' seems disingenuous, given the state's announced intent to apply its regulations to all vessels in state waters. . . . The question of whether state action undermines the foreign affairs of the nation is one for the President and Congress, whose judgments are generally binding on the judiciary.

[17] *See* Unsafe Practices Following Adoption of BAP Rules, Appendix E.

by valid U.S. treaties which, no less than federal statutes, are the law of the land.

CONCLUSION

For the foregoing reasons, as well as those stated in the briefs of both the United States of America and Intertanko, Amici, Puget Sound Steamship Operators Association and the Chamber of Shipping of British Columbia, urge that the judgment of the Court of Appeals for the Ninth Circuit should be vacated. This case should be remanded for further proceedings in the District Court to carefully reconsider which of the Washington rules at issue are preempted by federal law.

Respectfully submitted,

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Vancouver, B.C.
Vancouver Island
Washington State
STRAIT OF GEORGIA
STRAIT OF JUAN DE FUCA

APPENDIX A

VANCOUVER, B.C.
BURRARD INLET
FRASER RIVER
GABRIOLA I.
STRAIT OF GEORGIA
STUART CHANNEL
THRASHER ROCK
CANADA
UNITED STATES
CHERRY POINT REFINERY
BELLINGHAM
VANCOUVER ISLAND
HARO STRAIT
ANACORTES REFINERIES
STRAIT OF JUAN DE FUCA
WASHINGTON
SEATTLE
TACOMA

APPENDIX C

HISTORICAL CASE LAW INTERFERENCE EXAMPLE

Of local historical interest is the case of *Pacific Northern Oil Corp. v. Jefferson County,* United States District Court for the Western District of Washington, Cause No. C86-114R (1986), with which the author is familiar. Jefferson County, in the northwest corner of the State of Washington, under the guise of protecting against possible pollution damages, issued a Cease and Desist Order against two suppliers of bunker fuel who frequently serviced vessels brought to sheltered anchorage at Port Townsend Bay, Jefferson County, Washington. As authority for its action, the County relied on Washington State's Shoreline Management Act. The County characterized the fueling operations as "undertaking a development or substantial development" and ordered cessation until the suppliers applied for and obtained "a substantial development conditional use or variance permit" from the County Planning Commission.

The fuel companies immediately applied for a Restraining Order. The Memorandum in Support of their application cited preemption by compliance with Coast Guard regulations issued under the Ports and Waterways Safety Act ("PWSA"), plus the invalidity and preemption of the local regulations under the Supremacy and Commerce Clauses of the United States Constitution.

Later, the parties stipulated to certain operating conditions and a Decree was entered by the United States District Judge permitting the fuel companies "to carry out vessel refueling operations . . . without further restraint

or impediment by Jefferson County, upon the signing of the Interim Decree."

APPENDIX D

HYPOTHETICAL INCIDENT – VANCOUVER CALL VIA STRAIT OF JUAN DE FUCA

By way of a hypothetical taken largely from existing experience, consider the following: the "M/T Bergen" flying the Norwegian flag has a length overall of 175 meters and a beam of 26 meters. Its dead weight tonnage is 30,000 and its gross tonnage, 19,000. For the past eight months, the BERGEN has been carrying gasoline from St. Eustatius, Netherlands Antilles, to U.S. ports in California and New York and the Canadian port of Pt. Tupper near Halifax. The BERGEN was inspected by the United States Coast Guard in New York and passed her tank vessel exam with no deficiencies in February 1999. She has a current United States Coast Guard vessel response plan (VRP), as required by OPA 90, and has Geographic Specific Appendices for each Captain of the Port (COTP) zone the ship calls at in the United States.

The BERGEN was last inspected by the Canadian Coast Guard at Pt. Tupper in April 1999 and also passed that exam with no deficiencies. She currently meets all Canadian requirements.

The BERGEN loaded a full cargo of 210,000 barrels of gasoline in the Netherlands Antilles for discharge at Long Beach, California. However, one day before arriving Long Beach, half of the cargo was sold to a consignee in Vancouver, British Columbia, Canada.

Knowing that the BERGEN was already in compliance with U.S. and Canadian regulations, the ship operator directed the vessel to proceed to Vancouver, B.C. from Long Beach to discharge 105,000 barrels at West Ridge

Terminal, Vancouver. The operator contacted the Chamber of Shipping of British Columbia to establish an arrangement with a British Columbia oil spill response organization and notified the BCCS of the vessel's "authorized individual" designated to represent the owner in case of any spill problem, and its insurance underwriter to verify proper coverage. These notifications were in concert with the requirements of the Canada Shipping Act.

The vessel operator and Captain Nødtvedt both knew from prior experience that the U.S. Coast Guard grants "Innocent Passage" for vessels/tankers, and that there is no federal requirement for the vessel to have a geographic specific appendix to the OPA 90 VRP for the Seattle/Puget Sound COTP zone for this Canadian call. Thus, the tanker operator and master, who have not operated in Washington state waters since June 1995, were under the assumption that because all U.S. Coast Guard, Canadian and IMO regulations/guidelines are being met, the operator and this vessel are in complete compliance with applicable regulations.

The BERGEN sails from Long Beach on Friday, October 9, and the ship operator appoints a CSBC member as agent on Saturday. Proper notice of arrival is given. Monday is a U.S. national holiday and Thanksgiving day in British Columbia, and the ship is due to arrive Vancouver on Tuesday, October 12. The Vancouver agent, even if he had reason to check for Washington state compliance, could not do so until Tuesday, when the Washington Department of Ecology returned to work, as DOE is not open on weekends or holidays and they have no 24-hour telephone number.

The BERGEN encounters some periods of limited visibility in the Strait of Juan de Fuca and the Master makes sure that two qualified deck officers are on bridge watch until the vessel arrives at the Victoria, B.C. pilot station to take on a Canadian pilot. Thus, the BERGEN arrives safely at Vancouver at 0500 on Tuesday morning without ever having or knowing that, according to Washington state law, the operator should have had a Washington State prevention plan conforming to its BAP rules on file with the Department of Ecology.

To the operator's amazement, it is later assessed a $50,000 fine for not being in compliance with state rules, and, according to the Washington Department of Ecology, that the omission must be rectified and the fine paid before any of the operator's ships will be allowed in Washington waters.

APPENDIX E

UNSAFE PRACTICES FOLLOWING ADOPTION OF WASHINGTON BAP RULES

Shortly after the July 1, 1995, effective date for the BAP rules, two tankers bound for southern British Columbia ports and fearing they were not in compliance with the Washington rules, decided on a dangerous deviation plan. Instead of approaching through the Strait of Juan de Fuca and Haro Strait, the route for all deep draft vessels, they decided to divert around the north end of Vancouver Island and proceeded south between the eastern side of the island and the mainland. This "all Canadian route" allowed them to avoid Washington waters and approach their destination through the "Inside Passage" on the east side of the island, a notoriously narrow, relatively shallow and extremely hazardous route not utilized by deep draft or heavily laden vessels.

After arrival, when the dangers of this hazardous deviation were analyzed and disseminated, prudent operators refused to duplicate it. The Canadian Government lodged its strong diplomatic protest against the BAP regulations and Washington's breach of the 1979 Bilateral Agreement and the maritime industry is hopeful of favorable results.

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IN THE

Supreme Court of the United States

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), *et al.*,
Petitioners,

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE*, BALTIC AND INTERNATIONAL MARITIME COUNCIL AND CHAMBER OF SHIPPING OF AMERICA, IN SUPPORT OF PETITIONERS

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44 Fed. Reg. 31,592 (May 31, 1979) 20

44 Fed. Reg. 66,500 (November 19, 1979) 20

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44 Fed. Reg. 69,299 (December 3, 1979) 20

45 Fed. Reg. 48,822 (July 21, 1980) 20

45 Fed. Reg. 57,392 (August 28, 1980) 20

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46 Fed. Reg. 61,456 (December 17, 1981) 20

47 Fed. Reg. 10,533 (March 11, 1982) 21

47 Fed. Reg. 15,210 (April 8, 1982) 21

47 Fed. Reg. 17,968 (April 26, 1982) 21

47 Fed. Reg. 34,388 (August 9, 1982) 21

47 Fed. Reg. 50,494 (December 30, 1982) 21

48 Fed. Reg. 35,402 (August 4, 1983) 21

48 Fed. Reg. 38,646 (August 25, 1983) 21

48 Fed. Reg. 44,534 (September 29, 1983) 21

48 Fed. Reg. 45,718 (October 6, 1983) 21

48 Fed. Reg. 50,996 (November 4, 1983) 21

49 Fed. Reg. 11,170 (March 26, 1984) 21

49 Fed. Reg. 16,794 (April 20, 1984) 22

49 Fed. Reg. 32,178 (August 13, 1984) 22
49 Fed. Reg. 43,463 (October 29, 1984) 22
50 Fed. Reg. 87,30 (March 5, 1985) 22
50 Fed. Reg. 11,622 (March 22, 1985) 22
50 Fed. Reg. 21,166 (May 22, 1985) 22
51 Fed. Reg. 17,962 (May 16, 1986) 22
51 Fed. Reg. 19,338 (May 29, 1986) 22
52 Fed. Reg: 7744 (March 12, 1987) 22
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52 Fed. Reg. 47,526 (December 14, 1987) 23
53 Fed. Reg. 7745 (March 10, 1988) 23
53 Fed. Reg. 17,820 (May 18, 1988) 23
53 Fed. Reg. 47,064 (November 21, 1988) 23
54 Fed. Reg. 15,173 (April 17, 1989) 23
54 Fed. Reg. 18,384 (April 28, 1989) 23
54 Fed. Reg. 40,590 (October 2, 1989) 23
55 Fed. Reg. 634 (January 8, 1990) 23
55 Fed. Reg. 21,548 (May 25, 1990) 23
55 Fed. Reg. 25,396 (June 21, 1990) 23
55 Fed. Reg. 30,658 (July 26, 1990) 24

55 Fed. Reg. 32,244 (August 8, 1990) 24
55 Fed. Reg. 36,248 (September 4, 1990) 24
56 Fed. Reg. 31,030 (July 8, 1991) 24
56 Fed. Reg. 37,475 (August 7, 1991) 24
57 Fed. Reg. 14,483 (April 21, 1992) 24
57 Fed. Reg. 36,222 (August 12, 1992) 24
57 Fed. Reg. 41,812 (September 11, 1992) 24
58 Fed. Reg. 7376 (February 5, 1993) 24
58 Fed. Reg. 17,316 (February 5, 1993) 24
58 Fed. Reg. 27,628 (May 10, 1993) 25
58 Fed. Reg. 48,434 (September 15, 1993) 25
58 Fed. Reg. 52,598 (October 8, 1993) 25
58 Fed. Reg. 67,988 (December 22, 1993) 25
58 Fed. Reg. 68,274 (December 23, 1993) 25
59 Fed. Reg. 18,700 (April 19, 1994) 25
59 Fed. Reg. 36,316 (July 15, 1994) 25
59 Fed. Reg. 40,186 (August 5, 1994) 25
59 Fed. Reg. 42,962 (August 19, 1994) 25
59 Fed. Reg. 51,332 (October 7, 1994) 25
59 Fed. Reg. 53,286 (October 21, 1994) 26

60 Fed. Reg. 4522 (January 23, 1995) 26

60 Fed. Reg. 17,134 (April 4, 1995) 26

60 Fed. Reg. 24,767 (May 10, 1995) 26

61 Fed. Reg. 25,984 (May 23, 1996) 26

61 Fed. Reg. 39,770 (July 30, 1996) 26

62 Fed. Reg. 1622 (January 10, 1997) 26

62 Fed. Reg. 34,506 (June 26, 1997) 26

62 Fed. Reg. 51,188 (September 30, 1997) 27

62 Fed. Reg. 67,492 (December 24, 1997) 27

63 Fed. Reg. 7707 (February 17, 1998) 27

63 Fed. Reg. 19,190 (April 17, 1998) 27

63 Fed. Reg. 71,754 (December 30, 1998) 27

64 Fed. Reg. 26,672 (May 17, 1999) 27

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INTEREST OF THE *AMICI CURIAE*

In the court below, Petitioners argued that laws and regulations adopted by the State of Washington with regard to the design, construction, equipment, operation, and manning of oil tankers were preempted by comparable federal legislation and regulations under the Supremacy Clause and other provisions of the United States Constitution. The Baltic and International Maritime Council and the Chamber of Shipping of America as *amici* are uniquely able to describe the significant effect on the maritime industry's operations if the decision of the court below is allowed to stand. The Court has consistently allowed industry associations, including, *e.g.*, the predecessor to the Chamber of Shipping of America, to file briefs as *amicus curiae*. *See Exxon Shipping v. Ellenwood*, 508 U.S. 981 (1993); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 810 (1988).[1]

Founded in 1905, the Baltic and International Maritime Council (BIMCO) is the world's oldest and largest association of ship owners and operators. It represents over 1,000 owners and operators of approximately 12,500 vessels from over 100 countries, constituting about 60 percent of the world's merchant shipping capacity or about 460 million deadweight tons. BIMCO also represents approximately 1,600 ship brokers and has about 100 other members who

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored the brief in whole or in part and no person or entity, other than the *amici curiae* and their counsel made a monetary contribution to the preparation or submission of the brief.

share the group's interest in maritime issues. A major goal of the organization is the development of uniform worldwide standards with regard to the design, construction, equipment, operation, and manning of merchant vessels. To this end, BIMCO works closely with the International Maritime Organization (IMO) and numerous flag administrations. BIMCO is also the principal organization responsible for the development of standard charter parties, bills of lading, individual clauses, and other shipping forms.

The Chamber of Shipping of America (CSA) is a non-profit incorporated association. It represents sixteen U.S.-based companies which own, operate, or charter oceangoing tankers, container ships, and other merchant vessels engaged in both the domestic and international trades. The Chamber also represents other entities which maintain a commercial interest in the operation of such oceangoing vessels. CSA's principal function is to represent the interests of the U.S. merchant marine industry before the United States Congress, federal agencies, state legislatures, and before federal and state courts. CSA works closely with federal agencies concerned with maritime safety and marine environmental protection and provides a forum in which marine carriers can discuss and encourage maritime safety and marine environmental protection initiatives through industry working groups. The American Institute of Merchant Shipping, the predecessor group to the Chamber of Shipping of America, has filed numerous *amicus* briefs in federal and state court proceedings concerning a wide variety of issues of interest to its members.

STATEMENT OF THE CASE

The vast majority (approximately 95% by weight) of United States imports and exports travel via commercial vessels. The same is true of much of the rest of the world. The safety of the mariners operating commercial vessels in international commerce, the vessels and their cargoes, and the marine environment depend heavily on international uniformity with regard to the design, construction, equipment, operation, and manning of those vessels. The United States Government has become party to a number of international agreements designed to increase that uniformity. Further, the federal government has enacted numerous laws and promulgated numerous regulations and standards in this regard. State and local governments are preempted from disturbing uniform national standards in this area due to the pervasive impact of the federal system. The decision of the court below ignored the criteria set forth in this Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

SUMMARY OF THE ARGUMENT

The Court should reverse the judgment below because Congress has preempted the field by providing for a unified system of federal laws and regulations concerning the design, construction, equipment, operation, and manning of merchant vessels operating on the navigable waters of the United States and the general superintendence of the merchant marine by the U.S. Coast Guard. Congress, intentionally, has left no room for state and local governments to supplement this field.

ARGUMENT

I. CONGRESS HAS PLENARY AUTHORITY TO PREEMPT STATE AND LOCAL LAWS AFFECTING FOREIGN OR INTERSTATE COMMERCE

Congress has plenary authority to preempt state and local law in any field in which Congress is empowered to act. United States Constitution, article VI, clause 2. Federal authority is particularly pervasive with regard to foreign and interstate commerce. United States Constitution, article I, section 8, clause 2. Nevertheless, the historic police powers of the states are not to be deemed to be superseded by federal law unless that is the clear and manifest purpose of Congress. Congressional intent is the ultimate touchstone of preemption analysis. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

Such Congressional intent to preempt state and local law may be evidenced in several ways. The scheme of federal law and regulation may be so persuasive as to make reasonable the inference that Congress left no room for states and local governments to supplement it. Alternatively the federal laws and regulations may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state or local laws on the same subject. Likewise, the object sought to be obtained by the federal law and regulations and the character of obligations imposed by them may reveal the same purpose. Finally, the state or local policy may produce a result inconsistent with the objective of the federal statute. "It is often a perplexing question whether Congress has precluded

state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 231 (1947).

With respect to the power of the federal government as regards foreign and interstate commerce, this Court has stated: "Our basic responsibility in interpreting the Commerce Clause is to make certain that the power to govern intercourse among the states remains where the Constitution placed it." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552 (1944). The federal preeminence with regard to commerce in general and maritime navigation in particular dates from the founding of our country and was eloquently summarized by Chief Justice Marshall in 1824:

> If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of

> America adopted their government, and must have been contemplated in forming it.

Gibbons v. Ogden, 22 U.S. 1, 190 (1824)

Justice Johnson, concurring in *Gibbons*, stated:

> [F]or, although one grant of power over commerce should not be deemed a total relinquishment of power over the subject, but amounting only to a power to assume, still the power of the states must be at an end, so far as the United States have, by their legislative act, taken the subject under their immediate superintendence.

22 U.S. at 234.

The difficulty in parsing between where the federal government had sole authority to regulate with regard to commerce and navigation and where authority was shared with state and local governments was recognized by this Court as early as 1851. At that time, the issue was state authority to require certain vessels to utilize (or at least pay for) local pilots. The Court, recognizing that, in accordance with a federal law, local pilotage was largely a local as opposed to a national issue, stated:

> Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in

> question [pilotage], as imperatively demanding that diversity, which alone can meet the local necessities of navigation. . . . Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.

Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. 299, 319 (1851).

In 1937, this Court noted that the federal acts and regulations with respect to federally inspected vessels on the navigable waters of the United States are elaborate. *Kelly v. State of Washington*, 302 U.S. 1, 4 (1937). In that case, the issue before the Court was whether a state was preempted from regulating a limited group of commercial vessels that were not subject to the usual federal inspection laws. This Court sustained the state regulatory scheme, but with strong caveats, stating:

> A vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of that principle [uniformity of regulation]. The state may treat it as it may treat a diseased animal or unwholesome food. In such a matter, the state may protect its people without waiting for federal action providing the state action does not come into conflict with federal rules. If, however, the state goes further and attempts to impose particular standards as to structure, design, equipment, and operation, which in the judgment of its authorities may be desirable, but pass beyond what

> is plainly essential to safety and seaworthiness, the state will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether a state in a particular matter goes too far must be left to be determined when the precise question arises.

302 U.S. at 15.

II. THIS COURT'S HOLDING IN *RAY V. ATLANTIC RICHFIELD CO.* IS FULLY DISPOSITIVE OF THIS CASE

This Court has drawn a clear distinction between regulation of maritime pollution, where the authority of state and local governments to take action is not *per se* preempted by the federal government, *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), and regulation of the design and construction of inspected commercial vessels operating on the navigable waters of the United States, where the pervasive federal regulatory scheme does not admit of state or local government participation. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

In the *Ray* case, this Court drew a distinction between the mandatory provisions of Title II of the Ports and Waterways Act of 1972, which directed the Secretary of Transportation to promulgate certain marine safety regulations, and Title I of the Act, which authorized (but did not mandate) the Secretary to promulgate additional marine safety regulations. Basically, this Court held that the State of

Washington was preempted from regulating vessel design and construction standards because those standards came under Title II, the mandatory portion of the Act. 435 U.S. at 165. The State of Washington was not preempted from regulating in areas covered by Title I of the Act when the federal government had not prescribed regulations or standards under that authority. 435 U.S. at 171.

As this Court stated in another Commerce Clause case: "The fact that there is no express provision of pre-emption in the . . . Act . . . is not decisive. . . . It is the pervasive nature of the scheme of federal regulation . . . that leads us to conclude that there is pre-emption." *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973).[2]

In its ruling on the *Ray* case, this Court limited its preemption discussion to design and construction because those were the issues before the Court. Title II of the Ports and Waterways Safety Act of 1972 (which amended the Tank Vessel Act of 1936) though, was broader in its reach. Since the issue in the instant litigation involves the authority to regulate the operation and manning of vessels on the navigable waters of the United States, it is enlightening to review other pertinent provisions of the 1972 Act. There, Congress directed the Secretary,

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[2] In that case, the municipality's attempt to regulate aircraft noise at the local airport was held to be incompatible with the federal scheme even though the federal statute, at the time of the litigation, contained no preemption provision.

> [i]n order to secure effective provision (A) for vessel safety and (B) for protection of the marine environment, [to] establish . . . such additional rules and regulations as may be necessary with respect to . . . the maintenance of such vessels, . . . the handling and stowage of cargo, equipment and appliances for . . . prevention and mitigation of damage to the marine environment, . . . the operation of the vessel, . . . the requirements for manning, . . . the duties and qualifications of the officers and crew thereof, and . . . the inspection of all of the foregoing.

Pub. L. No. 92-340, § 201, 86 Stat. 427 (July 10, 1972).[3]

Thus, the statutory references to "design," "construction," and "equipment" found to be preemptive in *Ray* are separated by only a few words in the same sentence from the very subject matter of "operation" and "manning" at issue here. In light of this, the following excerpts from the *Ray* decision, which are logically applicable to the other subjects addressed in Title II of the Ports and Waterways Safety Act of 1972 in addition to design, construction, and equipment, ought to be fully dispositive of this case:

> Title II [of the Ports and Waterways Safety Act of 1972, now codified at 46 U.S. Code, Chapter 37] aims at insuring vessel safety and protecting the marine environment; and the Secretary must issue all

[3] This provision was originally codified at 46 U.S.C. § 391a. It has been amended at various times subsequently, and is now located at 46 U.S.C. § 3703.

> . . . regulations that he deems necessary for these ends, after considering the specified statutory standards. The federal scheme thus aims precisely at the same ends as does [the Washington State Tanker Law]. Furthermore, under the PWSA, after considering the statutory standards and issuing all . . . requirements that in his judgment are necessary, the Secretary inspects and certifies each vessel as sufficiently safe to protect the marine environment and issues a permit or its equivalent to carry tank-vessel cargoes. Refusing to accept the federal judgment, however, the State now seeks to exclude from Puget Sound vessels certified as having acceptable . . . characteristics, unless they satisfy the different and higher . . . requirements imposed by state law. The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment.

Ray v. Atlantic Richfield Co., 435 U.S. 151, 165 (1978).

III. LEGISLATIVE AND REGULATORY ACTIVITY SINCE THE *RAY* DECISION PROVIDE ADDITIONAL EVIDENCE THAT THE FEDERAL GOVERNMENT HAS PREEMPTED THE FIELD WITH RESPECT TO THE "OPERATION, EQUIPPING, PERSONNEL QUALIFICATION, AND MANNING" OF VESSELS

Even though the above analysis should be dispositive in this case, there is additional evidence of Congressional preemption to be considered, based on federal legislative and regulatory developments in the intervening years since *Ray*. While this Court acknowledged the elaborate level of federal regulation of inspected vessels in 1937 and again in 1978, numerous federal statutes and a plethora of U.S. Coast Guard regulations have been promulgated since the *Ray* decision resulting in even more intense federal oversight of the marine industry. The more significant post-*Ray* statutes and regulations are summarized below.

Even before the ink was dry on the *Ray* decision, Congress enacted the Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471 (October 17, 1978); codified at 33 U.S.C. § 1221, *et seq.* As stated in the legislative history: "[This bill] expands the provisions now found in title I of the Ports and Waterways Safety Act of 1972. In addition, it amends the Tank Vessel Act of 1936 [Title II of the PWSA] to include additional authority over the construction, operation, and manning of tank vessels. Finally, it includes provisions for addressing the problem of vessels operating near our coastlines and provides for the

supervision of lightering operations in offshore waters." H.R. Rep. No. 95-1384 – Part I, pages 2-3 (as contained at 1978 U.S. Code Cong. & Admin. News 3271).

Two years later, Congress enacted the Act to Prevent Pollution from Ships, Pub. L. No. 96-478, 94 Stat. 2297 (October 21, 1980); codified at 33 U.S.C. § 1901, *et seq.* The legislative history of this enactment notes: "The purpose of this legislation is to implement the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 [MARPOL 73/78]." H.R. Rep. No. 96-1224, page 2 (as contained at 1980 U.S. Code Cong. & Admin. News 4849). MARPOL 73/78 established international standards for the design and operation of tankships and other vessels. It also established detailed controls on the discharge of oil from ships. The federal law not only made MARPOL 73/78 applicable in United States waters, it created criminal and civil penalties for failure to comply with those provisions while in U.S. waters and authorized the U.S. Coast Guard to enforce the requirements.

Following the oil spill from the EXXON VALDEZ, Congress enacted the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (August 18, 1990) ("OPA 90"). Title I of OPA 90 is codified at 33 U.S.C. § 2701, *et seq.* The remainder of OPA 90 consisted mostly of amendments to existing federal laws, primarily in Title 46, U.S. Code, Shipping, and Title 33, U.S. Code, Navigation and Navigable Waters. The legislative history of OPA 90 is extensively reported in S. Rpt. No. 101-94, as found at 1990 U.S. Code Cong. & Admin. News 722.

Most recently, Congress authorized the Coast Guard for the first time to regulate the shoreside activities of ship owners and operators by enacting the Coast Guard Regulatory Reform Act of 1996, Pub. L. No. 104-324, Title VI, 110 Stat. 3927 (October 19, 1996); codified at 46 U.S.C., Chapter 32. The purpose of this new authority was:

> to authorize the Secretary to prescribe regulations regarding shipboard and shore-based management of vessels and personnel. This authority would include conducting examinations and requiring the maintenance of records. The purpose of this section is to implement the International Safety Management [ISM] Code. This agreement, which the U.S. Government has signed, requires owners of vessels engaged in foreign commerce to manage their vessels in a safe manner. This initiative recognizes that many of the decisions directly affecting the safety and environmental conditions on vessels are made on shore. The Secretary currently lacks legal authority to require adoption and use of the ISM Code by owners and operators of U.S.-flag vessels. Neither the International Convention for the Safety of Life at Sea [SOLAS] in general, nor the ISM Code in particular, derogate any of the pollution prevention measures contained in current U.S. law. SOLAS, including the ISM Code, augments safety and pollution prevention measures already enacted in the United States.

S. Report No. 104-160, page 27 (as contained at 1996 U.S. Code Cong. & Admin. News 4267).

It is also of significance that Congress, in 1983, saw fit to partially recodify Title 46, United States Code. In enacting that recodification, Congress stated:

> The maritime laws of the United States have long been in need of major revision and recodification. They are a confusing collection of individual statutes enacted over a period of nearly two centuries – each enacted to solve some particular problem of the day. Viewed now, as a whole, they are poorly organized, duplicative, often obsolete, and difficult to understand and apply.
>
> Some of the oldest and most frequently amended of our maritime laws are those administered by the Coast Guard. These laws, which are referred to in this Report as maritime laws, are related primarily to the safety of merchant vessels. They also cover, however, the safety [of] recreational vessels, the protection of the merchant seamen, and the protection of the environment.
>
> Many of the maritime safety laws that are related to the safety of merchant vessels and the protection of seamen were codified in 1874 in Titles 52 and 53 of the Revised Statutes. They, along with the maritime laws related to recreational vessels and protection of the environment, are now found primarily in title 46 of the United States Code. A few are also found in title 33.
>
> The purpose of [this legislation] is to revise, consolidate, and enact into positive law as a subtitle

> to title 46 of the United States Code (Shipping) the maritime safety laws administered by the United States Coast Guard. The ultimate aim of this legislation is three-fold: to make maritime safety and seamen protection law easier for the Coast Guard to administer, to make it less cumbersome for the maritime community to use, and to make it more understandable for everyone involved.

H.R. Rep. No. 98-338, page 113 (as contained at 1983 U.S. Code Cong. & Admin. News 925).[4]

Among other provisions in the recodified Subtitle II of Title 46, United States Code is section 2103, which provides:

> The Secretary [of Transportation] has general superintendence over the merchant marine of the United States and of merchant marine personnel insofar as the enforcement of this subtitle is concerned and insofar as those vessels and personnel are not subject, under other law, to the supervision of another official of the United States Government. In the interests of marine safety and seamen's welfare, the Secretary shall enforce this subtitle and shall carry out correctly and uniformly administer this subtitle.

[4] While this measure was largely a recodification of prior laws, substantive changes from that prior law are to be considered intentional. *See* H.R. Rep. No. 98-338, pages 117-120 (as contained at 1983 U.S. Code Cong. & Admin. News 929-932).

> The Secretary may prescribe regulations to carry out this subtitle.

Pub. L. No. 98-89, 97 Stat. 506 (August 26, 1983); codified at 46 U.S.C. § 2103. *See Transportation Institute v. U.S. Coast Guard*, 727 F. Supp. 648 (D.D.C. 1989). With limited exceptions not pertinent here, the Secretary has delegated this authority to the Commandant of the Coast Guard. *See* 49 C.F.R. § 1.46.

Utilizing this virtually plenary authority over commercial vessel operations on the navigable waters of the United States,[5] the U.S. Coast Guard has promulgated a large number of regulations imposing new and more stringent restrictions and requirements on the marine industry in the years subsequent to the *Ray* decision.[6] A significant portion of those regulations were for the purpose of implementing the Oil Pollution Act of 1990 (OPA 90). As Rear Admiral Henn, USCG, stated to Congress in 1993: "OPA 90 is without doubt the single largest tasking which Congress has given [the U.S. Coast Guard]. There are numerous sections most of which are highly interrelated." H.R. Rep. No. 103-8, *The Oil Pollution Act of 1990*, page 5 (1993). *See also* H.R. Rep. No. 102-93, *Vessel Response Plans* (1992).

[5] "[V]essel safety specifications and periodic safety inspection requirements represent an exercise of Congressional power under the commerce clause, which has been delegated to the Coast Guard." *Land and Lake Tours, Inc. v. Lewis*, 738 F.2d 961 (8th Cir. 1984).

[6] Federal regulations have no less preemptive effect than federal statues. *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982).

Some of the more significant post-*Ray* rulemakings relating to design, construction, operation, and manning of merchant vessels promulgated by the U.S. Coast Guard are listed in the next section of this Brief.[7] A quick perusal, though, of the substantive portions of Titles 33 and 46 of the Code of Federal Regulations will reveal that almost every one of the Coast Guard provisions in those two titles has been totally superseded, or at least amended, since 1978. While not every federal statute or regulation, standing alone, demonstrates that the federal government pervasively regulates a particular field, the sheer number of federal regulations with regard to the marine industry, combined with their broad scope and fine detail, evidence that the federal government is of the view that there is little occurring on merchant vessels that it has not already regulated in one manner or another.[8]

In conclusion, while this Court did not have the occasion to rule in 1937 or in 1978 that the marine industry was pervasively regulated by the United States Government to the exclusion of regulation by state and local governments with regard not only to design, construction, and equipment, but also with regard to operation and manning, the occasion

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[7] Omitted from this listing are the numerous Coast Guard regulations relating to documentation of vessels, licensing of merchant mariners, inspection of vessels, investigation of marine casualties, etc.

[8] For a discussion of the similarities between the federal regulation of the maritime and aviation industries, see, Justice Jackson's concurring opinion in the case of *Northwest Airlines v. State of Minnesota*, 322 U.S. 292, 302-303 (1944).

has now arrived. The system of federal laws and regulations concerning these aspects of the marine industry and its operations on the navigable waters of the United States and the general superintendence of the merchant marine by the U.S. Coast Guard is now so pervasive as to make inescapable the inference that Congress has left no room for state and local governments to supplement this field.

List of Significant U.S. Coast Guard Rulemakings Promulgated Subsequent to *Ray v. Atlantic Richfield Co.*

The following is a chronological list of significant rulemakings promulgated by the U.S. Coast Guard subsequent to the decision of the U.S. Supreme Court in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (March 6, 1978). Significance was based primarily on the general application of the rule to merchant vessels operating on the navigable waters of the United States. Rulemakings focusing on waters that are the subject of the instant litigation also are included. Except as noted, all the rulemakings are either final rules or interim rules. Amendments to rulemakings promulgated subsequent to the first rulemaking on a particular topic following the *Ray* decision are generally omitted from this list.

Vessel Traffic Management; Puget Sound, 43 Fed. Reg. 12,257 (March 23, 1978).

Safety Approval of Cargo Containers, 43 Fed. Reg. 16,946 (April 20, 1978).

Additional Equipment for Vessels of 10,000 Gross Tons or More, 43 Fed. Reg. 32,112 (July 24, 1978).

Safety Standards for Self-Propelled Vessels Carrying Bulk Liquefied Gases, 44 Fed. Reg. 25,986 (May 3, 1979).

Navigation Safety Regulations; Electronic Navigation Equipment, 44 Fed. Reg. 31,592 (May 31, 1979).

Inert Gas and Deck Foam Systems, 44 Fed. Reg. 66,500 (November 19, 1979).

Tank Vessels of 10,000 Gross Tons or More; Improved Steering Gear Requirements, 44 Fed. Reg. 66,528 (November 19, 1979).

Benzene Carriage Requirements, 44 Fed. Reg. 69,299 (December 3, 1979).

Puget Sound Vessel Traffic Service Area, 45 Fed. Reg. 48,822 (July 21, 1980).

Notification of Arrivals, Departures, Hazardous Conditions, and Dangerous Cargoes, 45 Fed. Reg. 57,392 (August 28, 1980).

Casualty Reporting Requirements, 45 Fed. Reg. 77,439 (November 24, 1980).

Disestablishing of COLREGS Demarcation Lines for Puget Sound and Adjacent Waters of Northwest Washington, 46 Fed. Reg. 61,456 (December 17, 1981).

Lifesaving Equipment, 47 Fed. Reg. 10,533 (March 11, 1982).

Electrical Engineering Regulations, 47 Fed. Reg. 15,210 (April 8, 1982).

Tank Vessel Operation; Puget Sound, 47 Fed. Reg. 17,968 (April 26, 1982).

Navigation Safety Regulations; Radar Requirement for Certain Tankers of 10,000 Gross Tons or More, 47 Fed. Reg. 34,388 (August 9, 1982).

Electronic Position Fixing Devices, 47 Fed. Reg. 50,494 (December 30, 1982).

Ports and Waterways Safety; Control of Vessel Operations and Cargo Transfers, 48 Fed. Reg. 35,402 (August 4, 1983).

Freeboards; Load Line Regulations, 48 Fed. Reg. 38,646 (August 25, 1983).

Chart and Publication Requirements, 48 Fed. Reg. 44,534 (September 29, 1983).

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CONCLUSION

The judgment of the Court of Appeals should be reversed.

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IN THE

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THE UNITED STATES OF AMERICA,
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v.
GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, *et al.*,
Respondents.

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS,
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v.
GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE GOVERNMENTS OF BELGIUM, DENMARK, FINLAND, FRANCE, GERMANY, GREECE, ITALY, JAPAN, THE NETHERLANDS, NORWAY, PORTUGAL, SPAIN, SWEDEN, AND THE UNITED KINGDOM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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THE UNITED STATES OF AMERICA,
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BRIEF OF THE GOVERNMENTS OF BELGIUM, DENMARK, FINLAND, FRANCE, GERMANY, GREECE, ITALY, JAPAN, THE NETHERLANDS, NORWAY, PORTUGAL, SPAIN, SWEDEN, AND THE UNITED KINGDOM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*[1]

Like the Government of the United States, the Governments of Belgium, Denmark, Finland, France, Germany, Greece, Italy, Japan, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom (*Amici* or the *Amici* Governments) have broad interests in maritime affairs, including facilitation of maritime commerce and protection of the maritime environment.[2] In furtherance of these interests, the *Amici* and the United States have worked together in the International Maritime Organization (IMO) and the International Labour Organization (ILO) to develop and adopt international standards and regulations respecting measures to protect the marine environment from ship-source pollution.

These standards and regulations are set forth in a number of multilateral conventions to which the United States is party, including the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS); the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978, as amended in 1995 (STCW); and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, as amended (MARPOL). The *Amici* believe that the regulation of tanker equipment, personnel, and operations should continue to be considered and established multilaterally in appropriate international fora, principally IMO and ILO.

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person or entity other than the *Amici Curiae* has made a monetary contribution to the preparation or submission of this brief.

[2] The United States' trade with the countries represented by the *Amici* amounted to nearly $500 billion in 1998, about one-fourth of the total United States foreign trade. Four of the countries are among the United States' top ten trading partners, with 12 of the 14 among the top 50. Derived from INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, U.S. AGGREGATE FOREIGN TRADE DATA, 1998, table 9.

The Washington State regulations on these subjects conflict with the international regime in force for and in the United States and thus breach the United States' obligations under the treaties by which that regime is established. The *Amici* negotiate with the United States on the understanding that it can speak with one voice on matters of foreign affairs and foreign policy, including international maritime affairs. If the Washington State regulations at issue here are permitted to stand, not only will the United States be in breach of its international obligations, but its credibility in future negotiations will also be negatively affected.

The *Amici* formally notified the Government of the United States of their objections to the Washington State regulations in a Note Verbale dated June 14, 1996 (*reprinted* as Appendix L to the Petition for a Writ of Certiorari of the International Association of Independent Tanker Owners). Believing that this Court's resolution of the matter may preclude the necessity of further diplomatic efforts to obtain the United States' conformance to its treaty obligations, the *Amici* file this brief in support of petitioners' efforts to obtain reversal of that portion of the decision of the United States Court of Appeals for the Ninth Circuit that is before this Court.

SUMMARY OF ARGUMENT

The Washington State regulations challenged in this proceeding directly conflict with the international standards and regulations by which the United States, as a party to multiple international conventions, is bound. The United States is bound by treaty to abide by these standards and regulations throughout its territory, internal

laws to the contrary notwithstanding. The Washington regulations are thus a violation of the United States' international obligations. Their enforcement against vessels registered outside the United States in contravention of international law presents a continuing disturbance of international trade and comity and endangers the uniformity and reciprocity that are the keys to achieving international cooperation on tanker safety and protection of the marine environment.

ARGUMENT

As a contracting State to a number of multilateral treaties regarding maritime safety and protection of the marine environment, the United States is obligated to permit a vessel registered by another party to engage in international trade with the United States if the vessel is in compliance with the standards and regulations specified in the treaties. By the regulations addressed in this case, the State of Washington has imposed different and additional requirements on vessels engaged in foreign trade with the United States in waters within Washington State. This imposition of additional requirements as a condition to engaging in trade with the United States is a clear violation of the United States' treaty obligations to the other contracting parties, including the *Amici* Governments.

I. THE UNITED STATES IS PARTY TO INTERNATIONAL AGREEMENTS THAT ESTABLISH UNIFORM STANDARDS AND REGULATIONS RESPECTING SHIPBOARD MEASURES TO PREVENT POLLUTION OF THE MARINE ENVIRONMENT.

This case is not about the authority of the United States to regulate U.S.-flag vessels. Unlike *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), and *Kelly v. Washington*

ex rel. Foss Co., 302 U.S. 1 (1937), it does not involve the rights of individual states to regulate U.S.-flag vessels.[3] And unlike *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), this case does not involve a state's right to impose liability on vessels for damages caused by discharges from those vessels into state waters. Rather, this case entails a state's challenge to the United States' legally binding obligations under treaties to which it is party to allow foreign-flag vessels that are in compliance with treaty standards and regulations to participate in trade with the United States.

Shipping is a truly international enterprise involving vessels that fly the flags of many countries and trade around the world. A vessel engaged in international commerce is affected by the laws of its "flag state"—the nation state under whose laws the vessel is documented or registered and under whose flag it sails—and those of the "port state"—the nation state in whose port the vessel is located. Accordingly, "treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which [is] to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions." *Mali v. Keeper of the Common Jail (Wildenhus' Case)*, 120 U.S. 1, 12 (1887). Of special importance in the context of this case are several multilateral conventions that establish detailed standards and regulations respecting shipboard measures to prevent pollution of the marine environment. By ratifying these

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[3] Unlike the regulation of U.S.-flag vessels addressed in *Ray* and *Kelly*, regulation of foreign-flag vessels is not within the traditional police powers of the states. *Cf. Ray*, 435 U.S. at 994, *Kelly*, 302 U.S. at 10. *See Rice v. Santa Fe Elev. Corp.*, 331 U.S. 218, 230 (1947) (implying a different analysis when federal law addresses a field that the states have not traditionally occupied).

treaties, the United States accepted the standards and regulations set forth therein as sufficient and appropriate for ships engaged in international trade and agreed to allow vessels in compliance with these standards to engage in international trade with the United States.

For the past 40 years, the focus of national governments for development of international shipping laws and regulations has been the International Maritime Organization (IMO), a specialized agency of the United Nations that is devoted exclusively to maritime matters. Its 157 Member States represent over 98 percent of the world's merchant shipping tonnage. The United States and all *Amici* Governments are Member States of IMO. The Organization was created by a United Nations treaty in 1948, and its first meeting was in 1959. Convention on the International Maritime Organization, Mar. 6, 1948, 9 U.S.T. 621, 289 U.N.T.S. 48, as amended. "From the very beginning, the improvement of maritime safety and the prevention of marine pollution have been IMO's most important objectives." INTERNATIONAL MARITIME ORGANIZATION, IMO: WHAT IT IS, WHAT IT DOES, HOW IT WORKS 3 (1998) (hereinafter, "IMO PAMPHLET").

Each year, IMO Member States send delegations to IMO's London headquarters to attend a wide variety of meetings, most of which are technical in nature. By this means, conventions are developed over months and years and ultimately are approved and sent to governments for ratification. Over 40 conventions and protocols have been adopted in this way, together with over 800 codes and sets of recommendations that complement the treaties themselves.

A notable feature of several important IMO treaties is the "tacit" or "rapid" amendment procedure. This permits Member States to come together at IMO, agree on technical amendments designed to address specific problems, and adopt an accelerated schedule for their entry into force that avoids the delays intrinsic in the usual ratification process. In this way, conventions are regulary updated to keep pace with technical developments, evolution of ship design, and specific problems of safety and environmental protection encountered by Member States.

The United States and the *Amici* Governments are leaders at IMO and in the development of the treaties initiated by that United Nations organization. They expect all contracting states to fulfill their obligations under these treaties and to respect, as provided in each of the treaties, the rights of all ships that meet treaty requirements to engage in international trade.

Of the more than 40 maritime treaties negotiated at IMO, at least three specifically address pollution prevention by establishing standards and regulations dealing with vessel construction, design, equipment, personnel, and operations. These treaties are the International Convention for the Safety of Life at Sea, 1974, as amended, (SOLAS), Nov. 1, 1974, 32 U.S.T. 47; the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978, as amended in 1995 (STCW), July 7, 1978, Int'l Maritime Org., Doc. Sales No. IMO-945E (1996); and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, as amended (MARPOL), Feb. 17, 1978, Int'l Maritime Org., Doc. Sales No. IMO-520(E) (1997). While other treaties may also address ship-source pollution matters, it is these three treaties with which the Washington State regulations impermissibly conflict.

The following summaries of these conventions do not attempt to recite each provision with which the Washington State regulations conflict. Rather, they describe only those provisions that demonstrate that the United States is obligated, as a party to these treaties, to accord trading privileges to vessels that are in compliance with the standards and regulations prescribed by the conventions respecting shipboard measures to prevent marine pollution. By imposing additional requirements on this subject, the Washington State regulations have placed the United States in violation of its treaty obligations.

A. SOLAS: The International Convention for the Safety of Life at Sea, 1974, as amended.

SOLAS establishes vessel safety, construction, and equipment standards and regulations that are implemented and enforced in the United States and around the world.[4] SOLAS is in force for 138 countries representing 98 percent of the tonnage of the world's merchant fleet, including the United States and the *Amici* Governments. The Contracting Parties expressly recognized that safety of life at sea can best be achieved through "establishing in a common agreement uniform principles and rules" directed to that purpose. SOLAS, 1974, Preamble. The Contracting Parties also agreed to "undertake to promulgate all laws . . . and regulations . . . which may be necessary to give the present Convention full and complete effect." SOLAS, 1974, Art. 1.

SOLAS focuses on protection of life at sea through regulation of vessel construction, fire protection, lifesaving devices, radio communications, navigation equipment and practices, and safety management (for both shoreside and

[4] The full text of SOLAS, including its articles, annexes, and certificates, is set forth in a volume of 542 pages. IMO, SOLAS CONSOLIDATED EDITION, 1997.

shipboard functions).[5] A vessel's compliance with SOLAS is generally determined through inspections and surveys conducted by or on behalf of the flag state, which issues a SOLAS certificate to conforming vessels. The flag state's certificates must be accepted by other countries as evidence of compliance unless there are "clear grounds" for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of the certificates. SOLAS, ch. I, Reg. 19(b). Accordingly, port states are obligated to allow ships with valid SOLAS certificates to operate in their waters while participating in international trade.

By statute, the United States acknowledges and reiterates its obligations under SOLAS, including its obligation to accept certificates issued by flag states that are party to SOLAS. 46 U.S.C. § 3303.[6]

B. STCW: The International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978, as amended in 1995.

STCW focuses on the qualifications and working conditions of seafarers, including prescribed work-hour

[5] SOLAS expressly incorporates the International Safety Management Code, SOLAS, ch. IX, Reg. 3, whose stated objectives are to "ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular, to the marine environment, and to property." IMO Resolution A.741(18), Annex ¶ 1.2.1. The Code requires shipowners and operators to observe safe practices in ship operation, provide a safe working environment, establish safeguards against all identified risks, and continuously improve the safety management skills of both shoreside and shipboard personnel, including their readiness to respond to emergencies. *Id.* at ¶ 1.2.2.

[6] The United States does not accept certificates from a nation that does not accord U.S. vessels the privileges that the United States accords to that nation's vessels. 46 U.S.C. § 3303. This is consistent with the principle of reciprocity that underpins most international agreements concerning maritime affairs.

limitations.[7] The Convention has 133 contracting states, including the United States and all *Amici,* representing 98 percent of the world's merchant shipping tonnage. STCW is designed to "establish[] in common agreement international standards of training, certification and watchkeeping for seafarers." STCW, Preamble. The Parties agreed to promulgate all laws and regulations necessary to give effect to the Convention so as to achieve "protection of the marine environment" by ensuring that "seafarers on board ships are qualified and fit for their duties." STCW, art. I.

STCW establishes mandatory standards for seafarer training and qualifications. A vessel's flag state must verify the competence of the vessel's crew in accordance with those standards and issue certificates evidencing compliance. Port states may verify compliance with STCW by checking a seafarer's certificate, which must be accepted unless there are clear grounds for believing that it was fraudulently obtained or that the holder of the certificate is not the person to whom it was originally issued. STCW, art. X, Annex, Reg. I/4(1). The port state must report any deficiencies to the flag state so that corrective action can be taken. *Id.* art. X(2). Failure to correct deficiencies identified by a port state constitutes the only basis upon which the Convention authorizes a Party to detain a foreign-flag vessel in its ports. STCW Annex, Reg. I/4(3). Otherwise, the contracting parties to STCW (including the United States) are obligated to allow vessels that meet STCW requirements to operate in their waters.

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[7] The 1995 amendments entered into force on February 1, 1997. The full text of the Convention, related resolutions and the STCW Code are set forth in a volume of 320 pages. IMO, STCW 95 (1996).

C. MARPOL: The 1978 Protocol Relating to the International Convention for the Prevention of Pollution from Ships, 1973, as amended.

MARPOL is the comprehensive international regime governing discharges of oil and other harmful substances into the sea from ships.[8] MARPOL was adopted to "achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances." MARPOL Preamble. The Contracting Parties agreed that this objective could best be achieved by establishing rules "having a universal purport." *Id.* The Parties also agreed to give effect to the provisions of the Convention, including the Annexes thereto. MARPOL Convention 1973, Art. I; *see also* Protocol of 1978, Art. 1(1). The treaty has 108 contracting states, including the United States and the *Amici* Governments, representing 94 percent of the world's merchant shipping tonnage. The United States and the *Amici* Governments were leaders in the original negotiations and continue to be active participants in updating the treaty through rapid amendment procedures.

As evidence that a vessel has been surveyed and found in compliance with MARPOL's requirements, the vessel's flag state issues an International Oil Pollution Prevention certificate. The statute by which MARPOL is implemented in the United States (the Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901-1911) specifies that a "certificate issued by a country which is a party to [MARPOL] has the same validity as a certificate issued

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[8] The full text of the MARPOL Convention, including its articles, protocols, annexes, and unified interpretations, is set forth in a volume of 419 pages. IMO. MARPOL 73/78 CONSOLIDATED EDITION, 1997.

by [the Coast Guard]" in implementing MARPOL for U.S.-flag vessels. 33 U.S.C. § 1904(b).

Under each of these conventions, any port state inspections for the purpose of confirming compliance with the international standards and regulations must be conducted by "officers duly authorized by [the port state]." SOLAS, Reg. 19(a); STCW, art. X(1); MARPOL, Reg. 8A(1). In each instance, the authorizing entity must be the party to the convention, *i.e.*, the national government. Thus officials and vessels of the individual states of the United States cannot undertake enforcement action against foreign vessels unless they are authorized to do so by the United States. The officers duly authorized by the United States to serve as Port State Control Officers include employees of the United States Coast Guard. Exec. Order No. 12,234, 3 C.F.R. 277 (1981); Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, § 602, 110 Stat. 3927. Washington State officials have not been so authorized.[9]

II. THE WASHINGTON STATE REGULATIONS CONFLICT WITH THE INTERNATIONAL STANDARDS AND REGULATIONS AND ENDANGER THE UNIFORMITY AND RECIPROCITY THAT ARE CRITICAL TO ACHIEVING INTERNATIONAL COOPERATION ON TANKER SAFETY AND PROTECTION OF THE MARINE ENVIRONMENT.

The Washington State regulations challenged in this case impose requirements different from and in addition to those

[9] Resolution 787 of the 19th IMO Assembly, A.787(19), "Procedures for Port State Control," establishes qualifications for Port State Control Officers, which Washington State officials are unlikely to meet.

prescribed in the SOLAS, STCW, and MARPOL conventions. As a party to those conventions, the United States has agreed that a vessel registered by another contracting party may engage in international trade with the United States if it is in compliance with the standards and regulations specified in the conventions. The State of Washington's imposition of additional requirements as a condition to engaging in trade with the United States is a clear violation of the United States' treaty obligations to the other contracting parties, including the *Amici* Governments.

That the extra-treaty requirements have been imposed by an individual state rather than the United States itself is of no consequence to the other contracting parties.

> The states are unknown to foreign nations . . . . Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be held responsible for them; and all other regulations, but those that Congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity.

Gibbons v. Ogden, 24 U.S. (9 Wheat.) 1, 228-29 (1824) (Johnson, J., concurring); *see also Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941).[10] Moreover, the United States is required to abide by its treaty obligations throughout its territory. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 322(2); *accord* Vienna

[10] "A State of the United States is not a 'state' under international law . . . , since by its constitutional status it does not have the capacity to conduct foreign relations. The United States alone, not any of its constituent States, enjoys international sovereignty and nationhood." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1, note 5 (1987) *See also United States v. Belmont*, 301 U.S. 324, 331-32 (1937).

Convention on the Law of Treaties, May 23, 1969, art. 29, 1155 U.N.T.S. 331. Conflicting internal laws cannot excuse the United States' failure to comply with its treaty obligations. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(b); *accord* Vienna Convention on the Law of Treaties, art. 27.

In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), the Court recognized that "the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country," 345 U.S. at 581, and that subjecting vessels to the laws of various nations would cause "a multiplicity of conflicting and overlapping burdens [that] would blight international carriage by sea," *id.* Consequently, in determining which nation's laws should apply in a given situation, the Court turned to "a non-national or international maritime law of impressive maturity and universality." *Id.* That international maritime law "has the force of law . . . from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations," *id.* at 581-82. It "aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own." *Id.* at 582.

The situation here is similar, except that "by common consent of civilized nations," the applicable international maritime law has been set forth in the treaties described in the previous section. Like the "non-national or international maritime law" applied in *Lauritzen*, these treaties are designed to establish "stability and order" by adopting "rules designed to foster amicable and workable commercial relations." These rules include uniform standards and regulations respecting shipboard measures to prevent pollution of the marine environment. And like the

"usages" adopted in *Lauritzen*, these uniform standards and regulations are based on "considerations of comity, reciprocity and long-range interest," and "define the domain which each nation [may] claim as its own."

Even more so than the general international maritime law recognized in *Lauritzen*, this international regime of shipboard measures to prevent pollution of the marine environment has "the force of law." It is a binding treaty commitment of the United States. Permitting the individual states of the United States to adopt and enforce their own regulations respecting shipboard measures to prevent oil pollution not only would violate the United States' international obligations, but, as the *Lauritzen* Court recognized, it would also cause "a multiplicity of conflicting and overlapping burdens [that] would blight international carriage by sea."

The necessity for uniform regulations for foreign vessels engaged in trade with the United States has been recognized from the beginning of the nation. The lack of uniformity in this regard was a major source of dissatisfaction with the Articles of Confederation. "The relative situation of the United States [under the Articles of Confederation] has been found, on trial, to require uniformity in their commercial regulations, as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States . . . ." Resolution of January 21, 1786 (drafted by James Madison) Appointing Virginia Commissioners to the Constitutional Convention, *quoted in Gibbons v. Ogden*, 24 U.S. (9 Wheat.) 1, 225 (1824) (concurring opinion of Johnson, J.). *See also Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283-86 (1976). Uniformity and reciprocity are even more important today,

with the United States almost totally dependent on foreign-flag vessels for its international trade.[11]

Ironically, the Washington State regulations reflect a sound appreciation for the benefits of uniformity. They prescribe a uniform format and arrangement for spill-prevention plans. WASH. ADMIN. CODE § 317-21-100. They mandate uniform use, in that plan, of the English system for units of measure. *Id.* § 317-21-110.[12] They prescribe uniform standards for tank vessels operating within Washington State waters with respect to "practices, policies, and procedures" in watches (*id.* § 317-21-200), navigation (*id.* § 317-21-205), engineering (*id.* § 317-21-210), prearrival tests and procedures (*id.* § 317-21-215), emergencies (*id.* § 317-21-220), alcohol and drug testing (*id.* § 317-21-235), evaluation of crew fitness and performance (*id.* § 317-21-240), and ship management, including oversight, overall program, specific program elements, vessel visitation, and preventive maintenance (*id.* § 317-21-260). They prescribe a uniform crew training program (*id.* § 317-21-230) and uniform work hours (*id.* § 317-21-255). The prescribed "bridge resource management system" must be uniform "throughout the owner's or operator's fleet." *Id.* § 317-21-200(2).

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11 More than 95 percent of the United States' foreign trade is transported by vessels. U.S. DEPARTMENT OF TRANSPORTATION, AN ASSESSMENT OF THE U.S. MARINE TRANSPORTATION SYSTEM: A REPORT TO CONGRESS (1999), Introduction. And more than 97 percent of that ocean borne foreign trade is carried aboard foreign-flag vessels. Derived from U.S. MARITIME ADMIN., 1997 ANNUAL REPORT 52, table 13.

12 The Washington State regulations thus reject the metric system, which is the prevalent international system for units of measure. For a recent example of the hazards of converting between units of measure, see Andrew Pollack, *Two Teams, Two Measures Equaled One Lost Spacecraft*, N.Y. TIMES, October 1, 1999, at A1.

Unfortunately, the benefits of "uniformity" in this instance are eliminated, indeed reversed, by the state's necessarily narrow focus. Local regulation of a multistate or multinational industry will always cause disparate mandates. That is why the Constitution places control of foreign affairs and regulation of foreign commerce with the national government. More important in this respect, it is why the United States and the *Amici* Governments place such importance in IMO and the treaties that have been developed under its auspices. Recognition that local, even national, regulation of ships is often counterproductive is the *raison d'être* of IMO: "Because of the international nature of the shipping industry, it had long been recognized that action to improve safety in maritime operations would be more effective if carried out at an international level rather than by individual countries acting unilaterally and without co-ordination with others." IMO PAMPHLET at 3. Once the United States has determined that the interests of "the country as a whole" are best served by a treaty designed to provide uniformity in an area of international commerce, a state "cannot refuse to give foreign nationals their treaty rights because of fear that valid international agreements might possibly not work completely to the satisfaction of state authorities." *Kolovrat v. Oregon*, 366 U.S. 187, 198 (1961). *See also Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 444-51 (1979).

Because the State of Washington is not a nation state, its regulations manifest an understandable lack of consideration for the role of reciprocity in international maritime relations. Only nation states may bestow their nationality on vessels engaged in international navigation. Thus the State of Washington cannot be a flag state, and no vessels engaged in foreign commerce fly its flag. As noted, however, the restrictions that the state places upon

foreign-flag vessels will, insofar as other nation states are concerned, be attributed to the United States. Similarly, the Washington State regulations indicate a lack of concern for the prospect that other states within the United States or equivalent subdivisions of other federally administered nations will impose special restrictions on vessels engaged in international commerce. Again, it is the United States and the other maritime nation states, not Washington State, that will suffer the consequences of such multifarious regulation. *Cf. Japan Line, Ltd., supra,* 441 U.S. at 453.

From the viewpoint of nations whose vessels engage in international trade, the Washington State regulations at issue here are incompatible with the principles of uniformity and reciprocity that have long been recognized by the United States and other maritime nations as key to adopting, implementing, and enforcing effective international standards and regulations for ships, including shipboard measures for protecting the marine environment. Whatever minimal special protection the State of Washington might hope to achieve through its imposition of divergent regulations on vessels engaged in international commerce will be offset many fold by the obstacles that these and similar divergent regulations raise for the international maritime community, including the United States and the *Amici* Governments, in its efforts to enhance protection of the marine environment throughout the United States and the world. Nor will any special benefit Washington State might derive prevent its regulations from being a violation of the United States' treaty obligations.

CONCLUSION

For the foregoing reasons, the Court should reverse that portion of the June 18, 1998 decision of the United States Court of Appeals for the Ninth Circuit (as amended on August 31, 1998) that affirmed the November 18, 1996 judgment of the United States District Court for the Western District of Washington.

Respectfully submitted,

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October 22, 1999

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Nos. 98-1701 & 98-1706

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GARY LOCKE, ET AL.,

Respondents.

INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS,

Petitioner,

v.

GARY LOCKE, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE GOVERNMENT OF CANADA IN SUPPORT OF PETITIONERS

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October 22, 1999

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QUESTION PRESENTED

Whether the Best Available Protection regulations adopted by the State of Washington with respect to the operation of vessels in the waters of the State of Washington conflict with the treaty obligations that the United States owes to Canada.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v.

GARY LOCKE, ET AL.,

Respondents.

INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS,

Petitioner,

v.

GARY LOCKE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This amicus brief is submitted in support of Petitioners. All parties have consented to the filing of this brief amicus curiae.[1]

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[1] No counsel for a party authored this brief in whole or in part. No person other than the amicus made a monetary contribution to the preparation or submission of this brief.

THE INTEREST OF AMICUS CURIAE THE GOVERNMENT OF CANADA

Canada and the United States are parties to the bilateral treaty proposed by Canada and accepted by the United States on December 19, 1979, and entitled Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (CVTMS Agreement), Dec. 19, 1979, U.S.-Can., 32 U.S.T. 377 (entered into force Dec. 19, 1979).[2] The geography of the Strait of Juan de Fuca region makes the CVTMS Agreement vital to the ability of both countries' ship traffic to operate safely in that region.

Canada and the United States are also parties to several multilateral conventions governing international shipping, collectively referred to as the International Maritime Treaties.[3] Canada has participated in good

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[2] The CVTMS Agreement is set forth in the Appendix at A-3 toA-22.

[3] These include the International Convention for the Safety of Life at Sea (SOLAS Convention), Nov. 1, 1974, 32 U.S.T. 47 (entered into force May 25, 1980), as amended; the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention), July 7, 1978, Int'l Maritime Org., Doc. Sales No. IMO-945E (1996) (entered into force April 28, 1984), as amended by the Seafarers' Training, Certification and Watchkeeping Code, July 7, 1995, Int'l Maritime Org., Doc. Sales No. IMO-945E (1996); and the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), Nov. 2, 1973, Int'l Maritime Org., Doc. Sales No. IMO-520E (1997), as amended by the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, Int'l Maritime Org., Doc. Sales No. IMO-520E (1997).

faith in negotiating and implementing these treaties with the United States.

Because the State of Washington's Best Available Protection (BAP) regulations, Wash. Admin. Code § 317-21-010 et seq., undermine internationally-agreed standards adopted through these treaties, those regulations threaten the orderly operation of maritime traffic in the region. Moreover, if the State of Washington is permitted to dictate the conditions of operation of this international maritime traffic, the door will be open for other local jurisdictions of the United States to erect their own, varying regulations, thereby creating a regulatory patchwork along North America's sea coasts and inland shores and endangering the uniform system adopted by treaty.[4]

STATEMENT OF FACTS

Vancouver is Canada's largest port. In concert with ports in the surrounding area, it handles thousands of cargo, container, and bulk shipments each year. These ports are the gateway to western Canada and their smooth operation is key to Canada's economy.

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[4] Canada also notes that, given the interests of its members, Intertanko chose to challenge only those portions of the BAP regulations dealing with tank vessels. Other sections of the BAP regulations raise many of the same concerns with respect to oil barges, especially vis-à-vis the CVTMS Agreement. The BAP regulation of oil barges should not be permitted to stand independent of the BAP regulations on oil tankers.

Commercial vessel traffic can access Vancouver and those regional ports from sea in two ways: Johnstone Strait and the Strait of Juan de Fuca. *See* Diagram 1. Johnstone Strait is narrow and hazardous. For that reason it has become accepted practice in the international shipping community to access Vancouver and the regional ports via the Strait of Juan de Fuca.

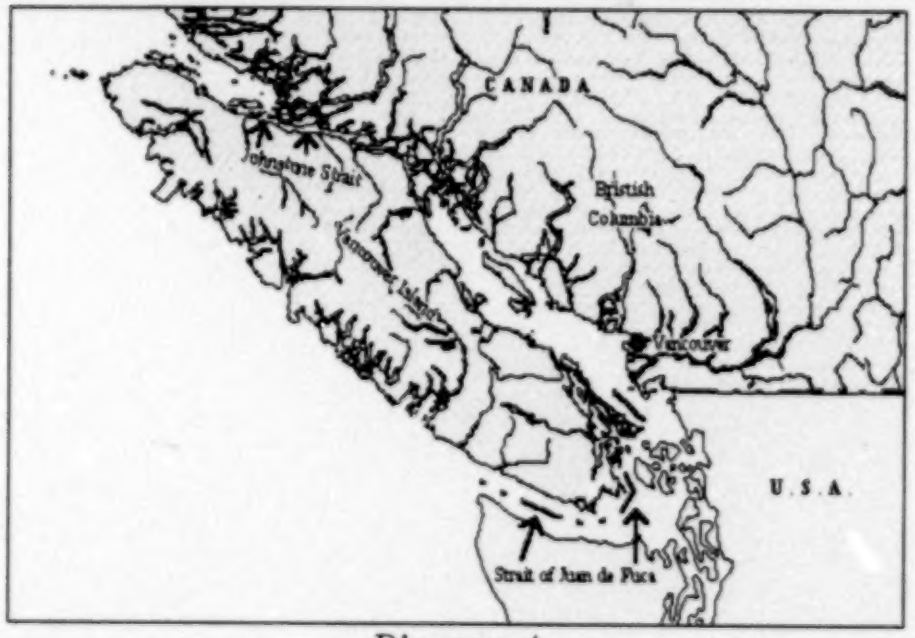

Diagram 1

To promote safe and orderly passage through the Strait of Juan de Fuca, Canada and the United States agreed in the CVTMS Agreement to devise a cooperative system of vessel traffic management. Under this system, all inbound traffic in the strait, regardless of destination, is routed through United States waters, while all outbound traffic is directed through Canadian

waters. The International Maritime Organization endorses this vessel traffic separation scheme.

In agreeing to this vessel traffic separation scheme, Canada relied on the United States' undertaking in the CVTMS Agreement that vessels bound for Canadian ports that complied with Canadian regulations regarding "vessel design, construction, manning and equipment" would be deemed to be in "material compliance" with the United States' own requirements. CVTMS Agreement, art. 204.2 (A-12). Canada has expressed its difficulties with the BAP regulations to United States authorities over many years, as well as through diplomatic representations, the most recent of which was a diplomatic note dated 7 May 1997. Diplomatic Note from the Embassy of Canada to the U.S. Department of State (Note No. 0389).[5/]

SUMMARY OF ARGUMENT

The treaties between the United States and Canada require the United States to honour its treaty obligations in respect of its entire territory. The BAP regulations enacted by Washington State are incompatible with the reciprocity provisions of both the CVTMS Agreement and the International Maritime Treaties.[6/]

[5/] Diplomatic Note 0389 is set forth in the Appendix at A-1 to A-2.

[6/] Both Petitioners contest, as a matter of United States law, the propriety of the Ninth Circuit's refusal to consider the United States' (continued...)

ARGUMENT

I.

The United States Is Required to Honour Its Treaty Obligations in Respect of its Entire Territory

Customary international law is binding on the United States. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793). *Pacta sunt servanda* is a well-established principle of international law, which provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. *See* 1 *Oppenheim's International Law*, Part 4, § 584, at 1206 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992); Vienna Convention on the Law of Treaties, May 22, 1969, arts.

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[6]/(...continued)
obligations to Canada. *International Ass'n of Independent Tanker Owners* v. *Locke*, 148 F.3d 1053, 1063-64 (9th Cir. 1998). *See* U.S. Pet. Cert. at 27 n.14 & Intertanko Pet. Cert. at 26-27. Regardless of whether the specific parties to this dispute properly preserved the issue of the United States' obligations to Canada in the lower court, the United States remains obligated under standards of international law to conform its conduct to its treaty obligations to Canada.

26, 27, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 331 (1969) ("Treaty Convention").[7]

It is equally well-established that a party to a treaty may not invoke provisions of its internal law as justification for failing to honour its treaty obligations, and that, unless a different intention is set forth in the treaty in question, a treaty is binding upon each party in respect of its entire territory. Treaty Convention, art. 29; *Estate of Pellat* v. *Mexico*, 5 Reports of Int'l Arbitral Awards 534, 536 (Fr.-Mex. 1929); Ian Brownlie, *State Responsibility in* 1 *System of the Law of Nations* 1, 141-42 (Fr.-Mex. 1983). When a state party is internally constituted as a federal system, that state party may not justify a failure to comply on the grounds that the noncompliance is the act of a constituent state. *The Montijo* (U.S. v. Colom. 1875), *reprinted in* 2 John Basset Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* 1421, 1440 (1898); Ivan Bernier, *International Legal Aspects of Federalism* 83 (1973).

Having undertaken solemn treaty obligations to Canada under the CVTMS Agreement, and to Canada and other parties to the International Maritime Treaties, the United States is not free to allow its constituent states to impose on maritime traffic within United States

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[7] Although the United States is not a party to the Treaty Convention, that convention is recognized as a codification of existing norms of customary international law. *See Restatement (Third) of Foreign Relations Law of the United States*, introductory note 18-19 (1987).

waters regulations or conditions that conflict with these treaty obligations to Canada.

II.

If Enforced, the BAP Regulations Would Violate the United States' Obligations to Canada Under the CVTMS Agreement

The key to the functioning of the CVTMS system is the parties' joint recognition of each other's regulatory regimes insofar as these affect vessels operating in the Strait of Juan de Fuca region. *See supra* pp. 4-5. This system based on mutual recognition was established in 1979 with the signing of the Agreement; in 1994, it was further strengthened by the Marine Safety and Marine Environmental Protection Comparability Analysis ("1994 Study"), which was conducted jointly by the United States and Canadian Coast Guards.[8/]

The 1994 Study was prompted by new legislative and regulatory changes introduced in both countries, in particular the United States Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified as amended in various portions of Titles 33 & 46 of the United States Code) and the amendments to the Canada Shipping Act, S.C. 1993, ch. 36 (Can.). The Canadian and United States Coast Guards reviewed their respective regulations in the areas of vessel design and

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[8/] Canada has lodged twelve copies of the 1994 Study with the Office of the Clerk of the Supreme Court of the United States.

construction, shipboard equipment, personnel qualifications and manning, shipboard operations, and pollution response, and determined that "broad overall comparability exists between the United States' and Canada's marine safety and marine environmental protection regimes." 1994 Study at i.

Of special relevance in this case is the provision of the CVTMS Agreement mandating reciprocal recognition of "vessel design, construction, manning and equipment requirements, and the measures for enforcement of these requirements" for ships incidentally transiting the waters of the other party in the Juan de Fuca region. CVTMS Agreement, art 204.2 (A-12). As a result of these provisions, ships bound for Canada, which are required by the CVTMS Agreement to transit United States waters, are deemed to be in material compliance with United States regulations so long as they comply with Canadian regulations. Similarly, ships outbound from the United States, which are required by the CVTMS Agreement to transit Canadian waters, are deemed to be in material compliance with Canadian regulations so long as they comply with United States regulations.

This reciprocity in according deference to the regulatory regime of each state party is vital to the functioning of the CVTMS Agreement and to the safe operation of ship traffic in the Juan de Fuca region. In the twenty years that the Agreement has been in effect, this system based on mutuality of recognition has worked well; indeed, the CVTMS Agreement has served as a model for the international community.

The BAP regulations repudiate the very basis of the Agreement – the reciprocal recognition of, and

acquiescence in, each state party's regulatory regime – for they purport to override Canada's standard-setting by imposing additional requirements on ships bound for Canadian ports. Not only is this result legally offensive, but, on a practical level, the BAP regulations undermine the viability of a traffic management system that was put in place to promote safe passage through a busy shipping corridor and to minimize the occurrence of environmental damage. Ships may seek to avoid the additional Washington State regulations by remaining in Canadian waters, either approaching Canada via the hazardous Johnstone Strait or transiting inbound and outbound in Canadian waters in the Strait of Juan de Fuca. Either way, the chance of an accident causing environmental damage is increased.

The BAP regulations thus threaten the integrity of the system, as well as the ability of the United States and Canada to achieve the goals of the CVTMS Agreement.

III.

If Enforced, the BAP Regulations Would Violate the United States' Obligations to Canada under the International Maritime Treaties

Canada, the United States, and other countries have worked for many years in international fora such as the International Maritime Organization to establish treaties governing international shipping. Under the International Maritime Treaties, the United States owes a number of obligations to Canada that are in addition

to those obligations established in the CVTMS Agreement. These obligations include, for example, the acceptance of Canada's certification that Canadian flagged vessels meet the criteria set out in the treaties, unless there are clear grounds for believing otherwise. Canada is similarly bound under these treaties to accept the United States' certification of United States-flagged ships.

Washington's BAP regulations cover subjects squarely dealt with under the International Maritime Treaties, notably the SOLAS Convention and the STCW Convention, in a manner inconsistent with the obligations created by those treaties. For example, BAP creates fleet-wide standards for bridge resource management, Wash. Admin. Code § 317-21-200(2), that are mandatory even for vessels never entering Washington waters. Bridge resource management is a nonmandatory item under the STCW Convention and is treated as such under Canadian regulations. In essence, if compliance with the BAP regulations affecting vessel operations, equipment, and manning were required, the United States effectively would be refusing to recognize as valid Canada's certification that its own ships meet the standards required under the treaties.

CONCLUSION

If upheld by this Court, the decision below would place the United States in the position of violating its treaty obligations to Canada. Canada therefore urges this Court to set aside the offending BAP regulations and to enforce the United States' obligations under the relevant international agreements.

Dated: Washington, D.C.
October 22, 1999

Respectfully submitted,

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APPENDIX

Canadian Embassy Ambassade du Canada

Note No. 0389

The Embassy of Canada presents its compliments to the Department of State of the United States of America and has the honour to refer to legal proceedings currently before the United States Court of Appeals for the Ninth Circuit, concerning the constitutionality of certain State of Washington statutes and regulations pertaining to the operation of oil tankers in state waters.

The Government of Canada notes that the initial lawsuit was brought by the International Association of Independent Tanker Owners (INTERTANKO) against the State of Washington and several of its officials before the United States District Court Western District, which dismissed the action in November 1996.

The Government of Canada is of the view that all laws, both federal and state, must comply with the 1979 Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (VTMS Agreement) and respect the principle of reciprocity which is crucial to the successful joint management of vessel traffic in the Strait of Juan de Fuca. It is the position of the Government of Canada that the application of certain of these Washington State regulations to vessels in-transit through United States' waters in the Strait of Juan de Fuca departing from Canadian ports violates the VTMS Agreement and has the unintended effect of jeopardizing

marine safety and environmental protection in the region.

The Embassy of Canada avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., May 7, 1997

EXCHANGE OF NOTES BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA CONSTITUTING AN AGREEMENT ON VESSEL TRAFFIC MANAGEMENT FOR THE JUAN DE FUCA REGION

OTTAWA, December 19, 1979.

FLM-211

Excellency,

I have the honour to refer to discussions between representatives of our two Governments for the purpose of reaching agreement on cooperative arrangements for vessel traffic management in waters near the common boundary of Canada and the United States in the region of Juan de Fuca Strait. Such arrangements are desirable for marine safety in light of increasing oil tanker and other vessel traffic in the west coast waters of Canada and the United States. The world-wide trend towards large tankers, and the possibility of their presence in coastal areas where they might add to the existing traffic, greatly strengthen the need for such cooperation.

The two Governments have already taken a number of parallel measures for safety of navigation in the Juan de Fuca area, including improved communications, surveillance radar installations and a voluntary routing system. I have the honour to propose that these cooperative arrangements be further strengthened. The attached Annex sets out the arrangements for implementation of a cooperative vessel

traffic management system for the region of Juan de Fuca Strait, consistent with our shared goals of safety of navigation and preservation of the marine environment.

I have the honour to propose that if these arrangements are acceptable to the United States Government, this Note, together with the attached Annex, which are authentic in English and French, and your confirming reply, shall constitute an Agreement between our two Governments for vessel traffic management in waters near the common boundary of Canada and the United States in the region of Juan de Fuca Strait. I have the honour further to propose that this Agreement enter into force on the date of your reply. This Agreement may be terminated by either Government upon six months' notice to the other or upon such longer period as may be specified in the notice of termination.

Flora MacDonald
Secretary of State for External Affairs

His Excellency Kenneth Curtis,
Ambassador of the U.S.A. to Canada,
OTTAWA.

ANNEX

AGREEMENT FOR A COOPERATIVE VESSEL TRAFFIC MANAGEMENT SYSTEM FOR THE JUAN DE FUCA REGION

100 PURPOSE AND OBJECTIVE

100.1 The purpose of this Agreement is to provide for a cooperative system of vessel traffic management in the applicable waters.

100.2 The objective of this Agreement is to enhance safe and expeditious vessel traffic movement and to minimize risk of pollution of the marine environment in the applicable waters by setting forth standards and procedures for:

(a) establishing a cooperative system of vessel traffic management;
(b) ascertaining through pre-clearance procedures and subsequent traffic monitoring, vessel compliance with pertinent regulations, procedures and practices; and alerting responsible authorities where non-compliance occurs;
(c) monitoring traffic movements to the degree required of the locality;
(d) providing on a routine basis, or on request, real time information to mariners on traffic, navigational dangers, weather and other safety matters;
(e) providing on request position fixing data where

this capability exists;

(f) responding to emergency situations.

101 DEFINITIONS

101.1 Applicable Waters

Means the waters on the southern coasts of British Columbia and the northern coasts of the State of Washington that are bounded:

(1) in the waters through which the international boundary runs,

(a) on the north, by the 49° north parallel of latitude, and

(b) on the south and east, by a rhumb line joining Point Partridge (Whidbey Island) and McCurdy Point (Quimper Peninsula); and

(2) in the waters to seaward

(a) on the northwest, by the 48°35'45" north parallel of latitude,

(b) on the southwest, by the 48°23'30" north parallel of latitude, and

(c) on the west, by the rhumb line joining 48°35'45"N., 124°47'30"W. with 48°23'30"N., 124°48'37"W.

102.2 Authority

Means the Commissioner of the Canadian Coast Guard of the commandant of the United States Coast Guard.

101.3 Berth

Means any wharf, pier, anchorage or mooring buoy.

101.4 Canadian Vessel Traffic Regulator or U.S. Watch Supervisor

Means the person at a vessel traffic management centre authorized by the appropriate authority to administer the vessel traffic management regulations.

101.5 Cooperative Vessel Traffic Management System

Means the cooperative system of vessel traffic management established within the applicable waters pursuant to this Agreement.

101.6 Exchange Line

Means a sector boundary where vessel traffic passes from management by one Authority to management by the other Authority.

101.7 Parties

Means the Government of Canada and the Government of the United States of America.

101.8 Routing System

Means any system of routing measures aimed at reducing the risk of casualties, including traffic separation schemes, two-way routes, recommended tracks, areas to be avoided, inshore traffic zones, roundabouts, precautionary areas and deep water routes.

101.9 Sector

Means a subdivision of the applicable waters geographically defined for purposes of allocating the responsibility for vessel traffic management to one of the Authorities.

101.10 Traffic Clearance

Means an authorization by a Canadian vessel traffic regulator or a U.S. watch supervisor for a vessel to enter the cooperative vessel traffic management system, depart a berth, proceed or manoeuvre within the applicable waters.

101.11 Vessel

Means every description of water craft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water.

101.12 Vessel Traffic Management

Means the management of vessel traffic by the use of such procedures and equipment as may be agreed by the Authorities, including vessel movement reporting systems, radar surveillance equipment, standard operation procedures and routing systems.

101.13 Vessel Traffic Management Centre

Means a centre established by the appropriate Authority for managing vessel traffic in the cooperative vessel traffic management system.

101.14 Vessel Traffic Management Regulations

Means regulations promulgated by each Party for vessel traffic management pursuant to this Agreement.

102 APPLICATION TO VESSELS

102.1 Except as otherwise herein provided this Agreement shall apply to all vessels.

102.2 Any vessel that is exempt from compliance with the provisions of this Agreement shall observe the ordinary practice of seamen and, so far as is reasonable and practicable, act in a manner consistent with this Agreement.

103 EXCHANGE LINES

103.1 The Exchange Lines in the applicable waters are as follows:

(a) The 124°40' west meridian of longitude in the Juan de Fuca Strait from the Canadian low-water line to the U.S. low-water line as depicted on official charts;

(b) Donaldson Island in position 48°19'54"N., 123°42'24"W. to position 48°13'37"N., 123°31'36"W.; thence to position 48°12'32"N., 123°24'24"W.; then to Hein Bank in position 48°21'06"N., 123°02'30"W.; thence to Cattle Point, San Juan Island in position 48°27'00"N., 122°57'42"W.;

(c) Lime Kilm Point in position 48°31'00"N., 123°09'06"W. to Kellet Bluff in position

48°35'18"N., 123°12'03"W.; thence to Turn Point in position 48°41'20"N., 123°14'10"W.; thence to Skipjack Island in position 48°44'00"N., 123°02'16"W.; thence to Clements Reef in position 48°46'42"N., 122°53'22"W.; thence to Alden Bank Buoy in position 48°50'24"N., 122°52'10".; thence in a 000° direction to the point of intersection with the 49°00'N. parallel of latitude.

103.2 The Exchange Lines may be modified by agreement of the Authorities, pursuant to recommendations of the Joint Coordinating Group established under this Agreement.

200 JOINT POLICY

201 JOINT PROCEDURES

201.1 The Parties agree that the development and implementation of the cooperative vessel traffic management system is best achieved by:

(a) developing and issuing vessel traffic management regulations and developing standard procedures at the headquarters level of the Authorities;

(b) developing the local vessel traffic management technical and operational details at the regional and district level of the Authorities, within the framework of national standards, with headquarters consultation; and

(c) developing routing systems and vessel traffic management systems taking into account, where appropriate, standards developed at IMCO on ships' routing and ship movement systems.

202 SYSTEM COMPATIBILITY

202.1 The Parties agree that the cooperative vessel traffic management system procedures and regulations in each country shall be compatible, to the extent possible, with those in the other and that any joint traffic separation scheme shall be submitted to the Inter-Governmental Maritime Consultative Organization.

203 REGULATING OF VESSEL TRAFFIC

203.1 Each Party undertakes to promulgate all vessel traffic management regulations necessary to give effect to this Agreement. The Authorities shall jointly determine the vessels to which particular regulations shall apply.

204 COMPATIBILITY OF OTHER REGULATIONS AND THEIR ENFORCEMENT

204.1 The Parties recognize the desirability of compatibility in their respective national regulations bearing on marine safety and environmental protection applicable to vessels using the cooperative vessel traffic management system. The Parties further recognize the desirability of consultation and coordination between

the Authorities to promote compatibility of these regulations to the fullest extent practicable consistent with domestic law and policy. At the request of either Authority, the other will provide an opportunity for consultation and coordination concerning such regulatory measures significantly affecting vessels using the cooperative vessel traffic management system.

204.2 The Parties consider that their respective vessel design, construction, manning and equipment requirements, and the measures for enforcement of these requirements, provide a comparable degree of marine safety and environmental protection and that their cooperative application will enhance the effectiveness of the vessel traffic management system. Each Party recognizes that vessels meeting its own standards enter the waters of the other Party in accordance with the agreed routing system. Each Party, in applying its regulations to vessels proceeding through its portion of the applicable waters solely en route to or departing from a port of the other Party, will consider compliance with the requirements of the other Party to be effectively equivalent to material compliance with its own requirements, so long as the requirements and enforcement practices of the other Party, in their totality, continue to provide a comparable degree of marine safety and environmental protection.

204.3 Nothing in Article 204 shall derogate from the right of each Party to take appropriate measures in accordance with its law in its portion of the applicable waters in relation to any specific vessel, the condition or

activities of which may pose an actual threat to marine safety or the marine environment. In order to facilitate cooperative enforcement action each Authority will consult at the request of the other, where time permits, concerning enforcement measures to be taken in particular situations posing a threat to marine safety or the marine environment in the applicable waters.

204.4 Should either Party consider making a determination that the requirements and measures for enforcement referred to in 204.2, in their totality, no longer provide a comparable degree of marine safety and environmental protection, that Party will notify the other Party and offer to consult on the matter. No final determination will be made in this respect for at least six months from the time of initial notification in order to allow sufficient time for the consultation process to be completed.

205 RELATION TO NATIONAL LAW AND POLICY

205.1 This Agreement and actions hereunder shall be without prejudice to the position of the Government of the United States and Canada with respect to the character of, and the nature and extent of coastal state jurisdiction over the applicable and adjacent waters.

206 RESPONSIBILITY FOR SAFE NAVIGATION

206.1 It is not the purpose of the cooperative vessel traffic management system instituted under this Agreement to attempt to manoeuvre or navigate vessels

from the shore. Therefore, the responsibility for safe navigation shall remain with the vessel's master or commanding officer. Notwithstanding any requirement in the vessel traffic management regulations, the master or commanding officer of the vessel shall retain the responsibility to take any action which by the ordinary practice of seamen or by any special circumstances is necessary to ensure safety of life or the safety of his own or any other vessel.

207 ENFORCEMENT

207.1 In the applicable waters under its jurisdiction, each Party shall enforce compliance with its vessel traffic management regulations.

208 NAVAL VESSELS AND GOVERNMENT VESSELS

208.1 Warships, naval auxiliaries and other vessels used for the time being for military purposes in non-commercial service will comply with the provisions of this Agreement, except when compliance would impair defence operations or defence operational capabilities. To the extent that it is consistent with the nature of these operations notice will be given to the vessel traffic management centre concerned.

208.2 Other vessels owned and operated by a State and used for the time being only on Government non-commercial service and performing governmental functions in the applicable waters will comply with the provisions of this Agreement, except when compliance

would impair the performance of governmental functions of a marine contingency nature. To the extent that it is consistent with the nature of the governmental functions being performed, notice will be given to the vessel traffic management centre concerned.

300 OPERATIONAL ELEMENTS

301 VESSEL TRAFFIC CLEARANCE

301.1 Prior to entering the cooperative vessel traffic management system or departing a berth within the system, each vessel shall obtain a traffic clearance in accordance with procedures to be agreed upon between the Authorities.

302 VESSEL TRAFFIC MANAGEMENT CENTRES

302.1 Vessel traffic management centres shall be established as necessary to manage and coordinate vessel traffic. These centres shall be in communication with each other by dedicated communications circuits in order to ensure real time knowledge of the total vessel traffic pattern in the applicable waters.

303 METHOD OF OPERATIONS

303.1 Each vessel traffic management centre shall, within its applicable sector:

(a) maintain VHF-FM radio contact with and receive reports from each vessel subject to the communications and movement reporting

requirements of the vessel traffic management regulations;

(b) maintain an accurate and up-to-date plot of all such vessels;

(c) maintain an accurate and up-to-date status display of all known hazards to navigation, including adverse weather conditions, large concentrations of fishing or recreational vessels, and discrepancies in aids to navigation;

(d) disseminate the information referred to in sub-paragraph (c) to all participating vessels that may be affected;

(e) provide, upon request, position fixing assistance, within the capability of the centre;

(f) in accordance with an agreed procedure, issue a vessel traffic clearance;

(g) in accordance with an agreed procedure, transfer responsibility between centres for each vessel at the time it crosses an exchange line; and

(h) upon detecting or becoming aware of any violation of the vessel traffic management regulations, report the violation to the appropriate enforcement official of the Party in whose waters the violation occurred.

304 SECTOR MANAGEMENT AND RESPONSIBILITY

304.1 All vessel traffic within the applicable waters to seaward of the exchange line established in subsection 103.1(a) shall be managed by Tofino Traffic Centre.

304.2 All vessel traffic to the east of the exchange line established by subsection 103.1(a) and to the south and east of the exchange lines established by subsections 103.1(b) and 103.1(c) shall be managed by the Seattle Traffic Centre.

304.3 All vessel traffic to the north and east of the exchange lines established by subsection 103.1(b) and 103.1(c) shall be managed by Vancouver Traffic Centre.

305 POLLUTION CONTINGENCY SUPPORT

305.1 In the event of a pollution incident occurring within the applicable waters where a response by one or both Parties under the terms of the Joint Canada/United States Marine Pollution Contingency Plan is required, the Authorities shall cooperate to the maximum extent practicable with the On-Scene Commander.

306 STANDARDS OF SHORE BASED EQUIPMENT

306.1 The Parties agree it is desirable to establish at the earliest feasible time a positive method of surveillance, generally radar where practicable, to ensure compliance with vessel traffic management regulations.

306.2 Except as they may otherwise agree, each authority shall be responsible for establishing, operating, and maintaining:

(a) VHF-FM communications coverage within its sectors, and

(b) radar surveillance systems incorporating provisions for the identification and tracking of vessels as follows:

(1) Canada: Strait of Georgia and Haro Strait from Point Roberts to Race Rocks; and on the west coast of Vancouver Island, from Estevan Point to Cape Flattery, Washington.

(2) United States: the Strait of Juan de Fuca from Cape Flattery to Whidbey Island; and Rosario Strait from Cherry Point to the southern entrance in the vicinity of Whidbey Island.

307 JOINT COORDINATING GROUP

307.1 The Authorities shall establish a Joint Coordinating Group at the Regional/District level. This Group shall have a permanent membership consisting of two VTM representatives from each Authority, one of whom shall serve as the Chairperson and that office shall alternate annually between each Authority. This Group may seek expert advice as it may deem appropriate. A meeting of the Joint Coordinating Group may be called by either Authority but in any event, it shall meet and submit a report to the Authorities annually.

307.2 The functions of this Group shall be:

(a) to receive and respond to representations by interested parties on operational problems of a local nature;

(b) to review and make early reports to both Authorities regarding the findings of any casualty investigation authority when a factor in its investigation concerns the management of traffic in the cooperative vessel traffic management system;

(c) to review and make recommendations to the Authorities concerning operating procedures and regulations;

(d) to review and make recommendations to the Authorities respecting modifications of the exchange lines established by section 103.1 of this Agreement;

(e) to advise the Authorities on policy and standards;

(f) to recommend to the Authorities consultative and operational procedures to be followed when a vessel is found to be in contravention of the vessel traffic management regulations; and

(g) to facilitate consultations between the Authorities on the effective implementation of this Agreement.

308 COMMUNICATIONS

308.1 The Parties undertake to promulgate in consultation with each other appropriate

communications regulations to ensure reliable and effective two-way voice communications throughout the vessel traffic management system.

309 AIDS TO NAVIGATION

309.1 The establishment and maintenance of aids to navigation in the applicable waters shall remain the responsibility of the Authority in whose territory or water the aids to navigation are located, except as may be otherwise expressly agreed by the Parties.

400 ADMINISTRATION AND RESPONSIBILITY

400.1 The Authorities shall be responsible for the administration of this Agreement.

400.2 The federal officers having Regional/District responsibilities for administration and operation of the cooperative vessel traffic management system are:

For Canada: The Regional Director,
Canadian Coast Guard,
Western Region.

For United States: The Commander,
Thirteenth Coast Guard District.

401 AMENDMENTS

401.1 Amendments to this Agreement may be made by mutual agreement of the Parties.

402 IMPLEMENTATION

402.1 The Authorities shall implement the cooperative vessel traffic management system as soon as possible, subject to appropriation of funds.

402.2 Each Party shall bear the costs of its own operations conducted pursuant to this Agreement.

A-22

Embassy of The
United States of America

Ottawa, December 19, 1979

No. 341

Madame,

I have the honor to refer to your note No. FLM-211 of this date, and to its Annex, proposing cooperative arrangements for joint management of vessel traffic in waters near the common boundary of Canada and the United States in the region of Juan de Fuca Strait.

I have the further honor to confirm that the cooperative arrangements set forth in your Note and its Annex are acceptable to the Government of the United States, and that your Excellency's Note and its Annex, together with this reply, shall constitute an agreement on this subject between our two Governments which will enter into force on the date of this Note.

Accept, Madame, the renewed assurances of my highest consideration.

Kenneth M. Curtis

The Honorable
Flora MacDonald, P.C., M.P.
Secretary of State for External Affairs
Ottawa

(16) (16)

Nos. 98-1701 and 98-1706

Supreme Court, U.S.
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CLERK

In The Supreme Court of the United States

UNITED STATES OF AMERICA, *ET AL.*,
Petitioners,

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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2788

QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether it is appropriate for a court to apply a presumption against preemption in an area where (a) the federal government historically has exercised a regulatory role and (b) inconsistent state rules would interfere with interstate and foreign commerce.

2. Whether the court of appeals erred in holding that Congress did not authorize the Secretary of Transportation to issue preemptive regulations relating to the operation of oil tankers.

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INTEREST OF *AMICI CURIAE*

Amicus Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation whose membership consists of 124 major manufacturers and sellers in a wide range of industries, from automobiles to electronics to pharmaceutical products. PLAC's primary purpose is to file *amicus curiae* briefs in cases involving issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted numerous *amicus* briefs in both state and federal courts, including many in this Court.

Amicus Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents more than 2.5 million businesses and organizations, with 140,000 direct members, in every industrial sector and geographic region of the country. The Chamber has filed numerous *amicus* briefs in this Court on the subject of preemption.

This case, which concerns the scope of the preemption doctrine, raises issues of considerable importance to *amici* and their members. The court of appeals took an unduly cramped approach to the doctrine; if applied in other contexts, that court's mode of preemption analysis would lead to the proliferation of varying and often conflicting rules governing the manufacture, distribution, and use of products in different jurisdictions. Because this outcome would impose substantial burdens and expense on manufacturers, sellers, and consumers — and because it often would frustrate the intent of Congress and federal regulatory agencies — we submit this brief to assist the Court in the resolution of this case.[1]

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[1] Pursuant to Supreme Court Rule 37.3, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded entirely by *amici* and was written entirely by their counsel.

INTRODUCTION AND SUMMARY OF ARGUMENT

The briefs of the United States and the private petitioner address in detail the language and purposes of the statutes and regulations that govern this case. Rather than duplicate those arguments here, we focus on two more broadly applicable and doctrinally significant aspects of the court of appeals' decision: its use of a presumption against preemption, and its holding that the Secretary of Transportation (the "Secretary") exceeded his authority in issuing preemptive regulations. Both of these elements of the holding below are significantly flawed.

A. There is no basis for the Ninth Circuit's evident assumption that a presumption against preemption applies in all cases, or applies equally in all cases. This Court's earliest Supremacy Clause decisions did not advert to any such presumption, and even in its modern cases the Court often wholly ignores the presumption — a pattern of inconsistent application suggesting that there is less to the presumption than the court of appeals believed. Moreover, a number of logical inconsistencies inhere in any general presumption against preemption: such a presumption would not mesh easily with clear statement rules that the Court applies in other contexts to safeguard constitutional values, and it is difficult to reconcile with the understanding that the fundamental preemption inquiry is one into congressional intent. After all, a presumption that must yield to any discernible indicia of Congress's preemptive purpose has very limited application.

Against this background, a presumption against preemption may have validity only when the statutory purpose regarding preemption is wholly indeterminate and the circumstances suggest that the presumption may serve as a proxy for congressional intent. That may be the case when a statute operates in a field where the States historically have had primacy and the federal interest is not firmly rooted; in

such a setting, it may make sense to presume (in the absence of contrary evidence) that Congress did not intend to displace state law. But such a presumption has no application in areas where Congress historically has been active, where there is a federal interest in uniformity of regulation, or where constitutional values point toward a paramount federal role. And that is true of this case, which involves use of navigable waterways, bears on the United States' foreign relations, and raises the prospect of inconsistent state regulations burdening interstate and international commerce. Against this background, there is no reason to indulge the presumption that Congress intended to preserve state law.

B. In addition, the court of appeals erred by failing to make any inquiry into whether the federal regulations *impliedly* preempt Washington's rules regarding tanker operation. In fact, the Court's decision in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 174 (1978), establishes that, when the Secretary "has addressed and acted upon [a] question" regarding tanker operation, varying state rules are superseded. In this respect, *Ray* simply applied the broader principle that federal regulations have no less a preemptive effect than, and are subject to the same preemption analysis as, federal statutes.

The court of appeals also went astray in holding that the Secretary's regulations could not have preemptive effect because "Congress did not explicitly or impliedly delegate to the Coast Guard the authority to preempt state law." *International Ass'n. of Independent Tanker Owners* v. *Locke*, 148 F.3d 1053, 1068 (9th Cir. 1998). There was no need to search for an affirmative indication that Congress meant to authorize the agency to preempt inconsistent state law; so long as the Secretary acted within the scope of his authority, the relevant preemption question concerns the agency's intent and not that of Congress. By the same token, the court of appeals was wrong in concluding that Section 1018 of the Oil Pollution Act of 1990 ("OPA 90"), 33 U.S.C. § 2718, denies

the federal regulations preemptive force. That provision, which states only that "[n]othing in this Act" affects the authority of the States, does not withhold authority from the agency to issue preemptive regulations under OPA 90 and says nothing about the agency's authority to issue regulations pursuant to *other* statutes.

ARGUMENT

FEDERAL LAW PREEMPTS WASHINGTON'S TANKER REGULATIONS

A. A Presumption Against Preemption Is Not Appropriately Applied In Cases Where There Is A Substantial Federal Interest In Uniformity

1. The court of appeals began its analysis with the declaration that courts must resolve cases like this one by applying a presumption against preemption. Citing to this Court's decision in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), the Ninth Circuit opined that "[c]onsideration of preemption issues 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by Federal Act unless that [is] the clear and manifest purpose of Congress.'" 148 F.3d at 1058-1059 (quoting *Rice*, 331 U.S. at 230) (bracketed material added by the court of appeals). We recognize that the Ninth Circuit is not alone in its application of this presumption; many courts, including this one, have adverted to such a presumption with some frequency. In our view, however, the court of appeals jumped too quickly to its evident conclusion that the presumption applies in *all* preemption cases, and that it applies in the same way in each.

As an initial matter, we note that there is no historical basis for such a conclusion. The Court's earliest Supremacy Clause cases made no mention of any presumption against preemption. See, *e.g.*, *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 343-344 (1816) ("the legislatures of the

states are, in some respects, under the control of congress, and in every case are, under the constitution, bound by the paramount authority of the United States"); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796) (applying no presumption in case where state criminal law was superseded by treaty). Nor did the Court in these early cases suggest that special treatment was appropriate for state laws involving exercise of the State's traditional police powers. To the contrary, Chief Justice Marshall took pains to explain for the Court that, if state laws "come into collision" with federal law by "interfering with, and being contrary to" acts of Congress,

> it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of [the State] must yield to the law of Congress * * * .

Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824). The Court gave no indication that any sort of presumption should govern analysis of the validity of such laws.

In fact, it was not until early in this century that the Court first adverted to a "presumption that state powers * * * survive unless clearly ended by Congress." Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 806 (1994). See R. David Allnut, Comment, *FIFRA Preemption of State Common Law Claims After* Cipollone v. Liggett Group, Inc., 68 WASH. L. REV. 859, 862 & n.14 (1993) (Court began referring to "a presumption in favor of state regulation" in the 1920s and 1930s). The presumption received its most commonly cited formulation in 1947 in *Rice* — although it is worth noting that in *Rice* itself the Court, having stated the presumption, made no further mention of it and proceeded to hold the challenged state law preempted. In the historical scheme of things, then, the

presumption applied by the court of appeals is a relatively recent creation.

By the same token, the presumption against preemption has been applied by the Court in an inconsistent and haphazard way. Although it is most often said to be applicable to federal laws that touch fields traditionally regulated by the States (see, *e.g.*, *Pacific Gas & Elec. Co.* v. *State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 206 (1983)), the presumption sometimes is said to govern *all* federal legislation (see, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981) (presumption that "Congress did not intend to displace state law")).

On the other hand, the presumption often is simply ignored by the Court. To be sure, there are a fair number of cases in which the Court has recited *Rice*'s passage on presumption or has invoked equivalent language.[2] But there are at least as many preemption decisions in which the Court has made no mention of the presumption at all. Justice Scalia thus has noted the substantial body of cases in which the Court "said not a word about 'a presumption against * * * preemption, * * * that was to be applied to construction of the text [of a statutory preemption clause]." *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 546 (1992) (opinion of Scalia, J.).[3] In fact, the decisions in which the Court has wholly disregarded any presumption against preemption

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[2] See, *e.g.*, *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996); *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); *English* v. *General Electric Co.*, 496 U.S. 72, 79 (1990); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).

[3] Justice Scalia cited *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and *Norfolk & Western R. Co.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117 (1991).

include cases involving express preemption,[4] field preemption,[5] and conflict preemption;[6] they include both cases upholding state laws[7] and those finding them superseded.[8] This pattern of inconsistent application suggests that there may be less to the presumption than first meets the eye.

2. That conclusion is confirmed by what appear to be a number of logical inconsistencies that inhere in any general

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[4] See, *e.g.*, *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995); *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995); *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990); *Louisiana Public Service Comm'n* v. *Federal Communications Comm'n*, 476 U.S. 355 (1986); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *Fidelity Federal Savings and Loan Ass'n.* v. *de la Cuesta*, 458 U.S. 141 (1982); *Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978).

[5] See, *e.g.*, *Wisconsin Dep't. of Industry, Labor and Human Relations* v. *Gould Inc.*, 475 U.S. 282 (1986); *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767 (1947); *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U.S. 740 (1942); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

[6] See, *e.g.*, *Freightliner Corp.*, *supra*; *Gade* v. *National Solid Wastes Management Ass'n.*, 505 U.S. 88 (1992) (plurality opinion); *Louisiana Public Service Comm'n, supra*; *Wisconsin Dep't. of Industry, Labor and Human Relations*, *supra*; *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985); *Brown* v. *Hotel and Restaurant Employees and Bartenders Int'l. Union Local 54*, 468 U.S. 491 (1984); *Capital Cities Cable, Inc.*, *supra*; *United States* v. *Shimer*, 367 U.S. 374 (1961); *McDermott* v. *State of Wisconsin*, 228 U.S. 115 (1913).

[7] See, *e.g.*, *Freightliner Corp.*, *supra*; *Louisiana Public Service Comm'n, supra*; *Brown*, *supra*.

[8] See, *e.g.*, *American Airlines, Inc.*, *supra*; *FMC Corp.*, *supra*; *Capital Cities Cable, Inc.*, *supra*; *Hines*, *supra*.

presumption against preemption. *First*, the presumption often is said to rest on "principles of federalism and respect for state sovereignty." *Cipollone*, 505 U.S. at 533 (Blackmun, J.). But this special solicitude for important state interests is in tension with other aspects of preemption doctrine, which regard the importance of the state interest at stake as wholly *irrelevant* to the analysis. Thus, it has long been settled that "'[t]he relative importance to the State of its own law is not material when there is a conflict with valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fidelity Federal Savings and Loan Ass'n.* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)). Indeed, even where the State has a "compelling interest" in preservation of its law, "under the Supremacy Clause, from which our preemption doctrine is derived, any state law, * * * clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade* v. *National Solid Wastes Management Ass'n.*, 505 U.S. 88, 108 (1992) (plurality opinion) (internal quotation marks and citations omitted). See, *e.g.*, *Brown* v. *Hotel and Restaurant Employees and Bartenders Int'l. Union Local 54*, 468 U.S. 491, 503 (1984); *DeCanas* v. *Bica*, 424 U.S. 351, 357 (1976) ("[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation.").

Second, the presumption against preemption does not function in a way that meshes easily with the clear statement rules that the Court has applied in other contexts to safeguard constitutional interests. As Justice Scalia has noted:

> To be sure, [the Court's] jurisprudence abounds with rules of "plain statement," "clear statement," and "narrow construction" designed variously to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied. * * * But none of those rules exists alongside a doctrine whereby the same result so prophylactically protected from careless explicit provision can be achieved by sheer implication, with no express statement of intent at all.

Cipollone, 505 U.S. at 546-547 (Scalia, J.). After all, such clear statement rules ordinarily are applied to guarantee that Congress *actually* has focused on achieving a particular result.[9] But that is not required in the preemption context. To the contrary, the Court will hold that federal laws have preemptive effect even "[w]here Congress likely did *not* focus specifically on the matter," so long as a ruling against preemption would produce an "anomalous result." *Medtronic, Inc.*, 518 U.S. at 504 (Breyer, J.) (emphasis added). And needless to say, Congress could not have expressly considered the question when *implied* preemption is at issue.

Third, application of a presumption against preemption often is difficult to reconcile with the central, universally acknowledged rule governing preemption cases: "[p]re-emption fundamentally is a question of congressional intent."

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[9] See, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) (Court will find that Congress waived the sovereign immunity of the United States only where the intent to do so is "unequivocally expressed"); *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 408 (1994) (O'Connor, J., concurring in the judgment) ("Congress must be 'unmistakably clear' before we will conclude that it intended to permit state regulation which would otherwise violate the dormant Commerce Clause") (citation omitted); *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989) (Court will find that Congress intended to abrogate state sovereign immunity only if that intention is made "'unmistakably clear in the language of the statute'") (citation omitted).

English, 496 U.S. at 78-79.[10] Even decisions that have forcefully stated the presumption have gone on to recognize that the Court's

> analysis of the scope of [a] statute's pre-emption is guided by [the] oft-repeated comment, initially made in *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103 (1963), that "[t]he purpose of Congress is the ultimate touchstone in every pre-emption case." * * * As a result, any understanding of the scope of a pre-emptive statute must rest primarily on "a fair understanding of congressional purpose."

Medtronic, 518 U.S. at 485-486 (quoting *Cipollone*, 505 U.S. at 530 n.7 (Stevens, J.)). See, *e.g.*, *New York State Conference of Blue Cross and Blue Shield Plans* v. *Travelers, Inc.*, 514 U.S. 645, 655 (1995); *Gade*, 505 U.S. at 116 (Souter, J., dissenting). And since the Court's "ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole" (*Gade*, 505 U.S. at 98 (plurality opinion)) — an inquiry that "'begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose'" (*FMC Corp.*, 498 U.S. at 57 (citation omitted)) — it appears that the presumption must yield to any discernible indicia of Congress's pre-emptive intent. See generally *Cipollone*, 505 U.S. at 544 (Scalia, J.) ("Under the Supremacy Clause, * * * [the Court's] job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning."). Indeed, we are not aware of any decision in which the Court found evidence of congressional

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[10] See, *e.g.*, *Gade*, 505 U.S. at 96 (plurality opinion); *Cipollone*, 505 U.S. at 545 (Scalia, J.); *FMC Corp.*, 498 U.S. at 56; *Allis-Chalmers*, 471 U.S. at 208; *Hillsborough County*, 471 U.S. at 714; *Brown*, 468 U.S. at 500; *Malone*, 435 U.S. at 504.

intent that would have been held sufficient in other contexts but was rejected because it did not overcome the presumption against preemption.

3. Against this background, we believe that such a presumption may have validity only in limited circumstances: where the statutory language is wholly ambiguous and the statutory purpose regarding preemption completely indeterminate, *and* where the circumstances suggest that a presumption may serve as a proxy for congressional intent. Thus, if a wholly ambiguous statute operates in a field where state regulation has had "historic primacy" (*Medtronic*, 518 U.S. at 485) — that is, where the federal government traditionally has not acted and the federal interest in a uniform rule is not firmly rooted — it may make sense to presume that Congress did not intend to displace state law.

But such a presumption regarding congressional intent has no application in areas where Congress often has been active, where there is a federal interest in uniformity of regulation, or where federal primacy is rooted either in tradition or in constitutional values. There is nothing novel in the conclusion that there is no place for a presumption in favor of state regulation in such circumstances. The court has long recognized that "the respective relation of federal and state power to the general subject matter" is relevant to the preemption inquiry. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 772 (1947). Indeed, the Court consistently has applied what amounts to a presumption *in favor of preemption* in cases where the interest in federal primacy and uniformity was manifest. See, *e.g.*, *Hines* v. *Davidowitz*, 312 U.S. 52, 63, 68 (1941) (foreign relations and regulation of aliens); *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U.S. 740, 749 (1942) (same). Cf. *Brown*, 468 U.S. at 502-503 (recognizing "presumption of federal pre-emption" in areas within the primary jurisdiction of the NLRB). This is only logical: it makes no sense to presume that Congress would

have wanted to preserve state laws that intrude on paramount federal interests, or that subject interstate or international commerce — commerce that, by hypothesis, already is subject to federal regulation — to inconsistent and possibly conflicting state rules.

In this case, these considerations suggest that application of a presumption against preemption is wholly inappropriate. The regulations at issue here involve use of the navigable waterways of the United States and affect "commerce on the high seas," matters in which there is a clear "federal interest in uniform regulation." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 187 (1978) (Stevens, J.). The existence of many international agreements in the area confirms that the disputed Washington regulations touch on the nation's foreign relations, obviously "a matter of national moment." *Hines*, 312 U.S. at 73. And, of course, "it should be recognized that this initial burden [on commerce imposed by Washington's regulations] is subject to addition and multiplication by similar action in other States." *Ray*, 435 U.S. at 189 (Stevens, J.). In such circumstances, it is not "plausible that Congress meant" to preserve state law (*American Airlines Inc.* v. *Wolens*, 513 U.S. 219, 232 (1995)) — and the Court surely should not indulge a presumption to that effect.

B. Validly Promulgated Regulations Have Preemptive Force Equivalent To That Of Statutes

Moving beyond the invocation of a presumption against preemption, there were two elements to the court of appeals' holding that the Secretary's regulations do not have preemptive effect. The court reasoned that the *regulations* could not preempt the field of tanker operation (or, presumably, work "conflict" preemption) because it read this Court's holding in *Ray* to stand for the proposition that the relevant federal *statutes* preempted only the field of tanker design and construction. See 148 F.3d at 1064-1067. And

the Ninth Circuit held that the Secretary's regulations — some of which do expressly preempt state law — could not be given effect because, in its view, "Congress did not expressly or impliedly delegate to the Coast Guard the authority to preempt state law." *Id.* at 1068. These conclusions, however, rested on a fundamental misunderstanding of the rules governing the preemptive effect of regulations.

1. The court of appeals appears to have understood this Court's decision in *Ray* as holding that the Ports and Waterways Safety Act of 1972 ("PWSA"), Pub. L. No. 92-340, 86 Stat. 424, preempted the field of tanker *design and construction* (see 148 F.3d at 1064-1066) and that regulations addressing tanker *operation* could have preemptive force in this context only if they *expressly* preempted state law. See *id.* at 1067 (after discussing whether PWSA preempted state regulation, court turned to the question "whether any of the [state] Regulations are expressly preempted by federal law"; *Ray* "teaches that once a court has determined that state tanker regulations are not subject to implied preemption as 'design and construction' requirements, the court still must examine whether the state regulations are expressly preempted"). But this analysis misreads both *Ray* and the broader preemption principles on which that decision rested.

It is true that the Court in *Ray* read Title II of the PWSA to "show[] that Congress, insofar as design characteristics are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States. This indicates * * * that Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements." 435 U.S. at 163. The Court therefore held that "[e]nforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers" (*id.* at 165), making it

"clear that Title II leaves no room for the States to impose different or stricter design requirements than those which Congress has enacted." *Id.* at 168.[11]

But that was not the end of the Court's analysis. The Court went on to discuss *Title I* of the PWSA, which authorized the Secretary to issue regulations involving tanker *operation*. Addressing a Washington State rule requiring that tankers entering Puget Sound be escorted by tug boats, the Court held:

> The relevant inquiry under Title I with respect to the State's power to impose a tug-escort rule is thus whether the Secretary has either promulgated his own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all. It does not appear to us that he has yet taken either course. * * * It may be that rules will be forthcoming that will pre-empt the State's present tug-escort rule, but *until that occurs*, the State's requirement need not give way under the Supremacy Clause.

435 U.S. at 171-172 (emphasis added).

The Court reached a different conclusion under Title I regarding a Washington regulation that excluded large tankers from Puget Sound. On this point, the Court again found that "[t]he pertinent inquiry * * * [is] whether the Secretary,

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[11] Although the court of appeals regarded *Ray* as involving preemption of the field of oil tanker design and construction, it is not entirely clear whether *Ray* actually involved field rather than conflict preemption. And in the circumstances here, it is doubtful that the distinction makes much difference. "[F]ield preemption may be understood as a species of conflict preemption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or implied) to exclude state regulation." *English*, 496 U.S. at 79 n.5. See *Gade*, 505 U.S. at 104 n.2 (plurality opinion).

through his delegate, has addressed and acted upon the question of size limitations." 435 U.S. at 174. Because the Secretary *had* addressed the question of tanker size without categorically excluding large tankers from the Sound (the federal regulations prohibited the passage of more than one large vessel through the Rosario Strait at any given time, see *id.* at 174-175), the Court held "that in this case the Secretary's failure to promulgate a ban on the operations of [large] oil tankers" takes on "'the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.'" *Ibid.* (quoting *Bethlehem Steel Co.*, 330 U.S. at 774). This meant that "States are not permitted to use their police power to enact such a regulation." *Ibid.* (quoting *Bethlehem Steel Co.*, 330 U.S. at 774). *Ray* thus stands squarely for the proposition that federal regulations dealing with tanker operation may *impliedly* preempt state law when the federal rule "ha[s] indeed dealt with the issue" (*id.* at 175), and that it was only the absence of *any* federal regulatory activity that saved Washington's tug-escort rule. That holding, of course, is dispositive here: as the petitioners' briefs demonstrate, the Secretary's regulations do deal pervasively with tanker operation.[12]

In this respect, the decision in *Ray* simply applied the broader principle that "[f]ederal regulations have no less pre-

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[12] In fact, the case for preemption has become considerably stronger since the decision in *Ray*. While that case addressed only the Secretary's authority under the PWSA, Congress has since enacted the Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471. That statute directs the Secretary to issue regulations addressing tanker design and operation. It was intended to "provide the Secretary * * * with broader and more extensive authority, stated more explicitly, to address these problems" (H.R. REP. NO. 95-1384, pt. 1, at 2 (1978)), and to encourage "the development and application of uniform international standards for such vessels." H.R. REP. NO. 95-1384, pt. 2, at 3-4 (1978).

emptive effect than federal statutes" (*Fidelity Federal*, 458 U.S. at 153) — and are subject to the same preemption analysis as are statutes — so long as they are validly promulgated pursuant to an authorizing law.

> The Supremacy Clause of the Constitution gives force to federal action * * * by stating that "the Laws of the United States which shall be made in Pursuance" of the Constitution "shall be the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. The phrase "Laws of the United States" encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization. For this reason, * * * "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation" and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law.

City of New York v. *Federal Communications Comm'n*, 486 U.S. 57, 63-64 (1988) (quoting *Louisiana Public Service Comm'n* v. *Federal Communications Comm'n*, 476 U.S. 355, 369 (1986)). The controlling question in this case accordingly is whether the Secretary's regulations either expressly or impliedly preempt state law.

2. In fact, the court of appeals seemingly acknowledged that various federal regulations do expressly preempt certain of Washington's rules.[13] But the court held that the regulations could not have preemptive effect because "Congress did not explicitly or impliedly delegate to the Coast Guard the authority to preempt state law." 148 F.3d at 1068. To the contrary, the court continued, "§ 1018 of OPA 90 establishes that nothing in OPA 90 may be construed

[13] For reasons explained by petitioners, it is plain that *all* of the challenged Washington rules are impliedly preempted by federal regulations, statutes, and international agreements.

as impairing the ability of the states to impose their own oil-spill requirements" and, "[i]n view of Congress's unwillingness to preempt state oil-spill prevention efforts on its own, we find implausible the argument that it intended to delegate power to the Coast Guard to do so." *Ibid.* This holding, however, was wrong on several levels.

First, the court of appeals erred in believing that it had to search for some affirmative indication that Congress intended to authorize the preemption of state law by a federal agency. In fact, the Court has

> emphasized that in a situation where state law is claimed to be pre-empted by federal regulation, a "narrow focus on Congress' intent to supersede state law [is] misdirected," for "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Fidelity Federal Savings & Loan Assn.* v. *de la Cuesta*, 458 U.S. 141, 154 (1982). Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area.

City of New York, 486 U.S. at 64.[14] See *Hillsborough County* v. *Automated Medical Labs., Inc.*, 471 U.S. 707, 713-714 (1985); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984); *Shimer*, 367 U.S. at 383.

Indeed, the notion that Congress would give an agency plenary authority to issue regulations while simultaneously denying those regulations preemptive effect leads to perverse results. It would mean, for example, that state laws would not be preempted even when they frustrated the manifest federal purpose. And it would leave private parties obligated to comply with a patchwork of irreconcilable federal and state rules. Absent the clearest statement from Congress, there is no reason to believe that it meant to erect such a bizarre regulatory structure. Just as the "repeal of [preemptive federal] regulation [does] not leave behind a pre-emptive grin without a statutory cat" (*Puerto Rico Dept. of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)), so the promulgation of a regulatory cat ordinarily must *give rise* to the preemptive grin.

Second, the court of appeals was plainly wrong in concluding that the Secretary's regulations are denied preemptive force by OPA 90 § 1018, which provides that "[n]othing in this Act" affects the authority of States or their political subdivisions to impose "additional requirements"

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[14] The Court added that "[i]t has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *City of New York*, 486 U.S. at 63 (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)).

respecting the discharge of pollutants. 33 U.S.C. § 2718(a), (c). In reaching this conclusion, the court relied on *Louisiana Public Service Comm'n*. See 148 F.3d at 1068. But that decision provides no support for the Ninth Circuit's holding here. In *Louisiana Public Service Comm'n*, the Court addressed a statutory regime in which Congress had "explicitly limited [the agency's] jurisdiction, so as to prohibit it from pre-empting state law." *City of New York*, 486 U.S. at 66. See *Louisiana Public Service Comm'n*, 476 U.S. at 370 (noting "express jurisdictional limits on [the agency's] power"). This meant that the "agency ha[d] literally no power to act, let alone pre-empt the validly enacted legislation of a sovereign State." *Id.* at 374. Here, in contrast, OPA 90 contains no equivalent jurisdiction-limiting provision. Moreover, even if Section 1018 somehow were read to deny the Secretary authority to issue preemptive regulations pursuant to OPA 90, the provision would say nothing about the Secretary's authority to issue regulations under the many *other* federal laws that permit him to act in this area — statutes that he in fact invoked in promulgating the relevant regulations and that give him "plenary authority to issue regulations governing" tanker operation. *Fidelity Federal Savings & Loan*, 458 U.S. at 161.[15]

It may be added that the court of appeals misunderstood the plain import of OPA 90 § 1018. When Congress enacted OPA 90, "it acted against a background of federal preemption on this particular issue." *City of New York*, 486 U.S. at 66. In this setting, when Congress specifically provided in Section

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[15] In addition to OPA 90, the statutes invoked by the Secretary in promulgating the regulations at issue here include, among others, the PWSA; the Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, 110 Stat. 3927; and the Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471. These statutes are codified at various points in Titles 38 and 46 of the United States Code.

1018 that "[n]othing in *this* Act" displaces state law, it must be understood to have intended to preserve the preemptive authority of existing statutes — a conclusion that is confirmed by the declaration in its legislative history that OPA 90 "does not disturb the Supreme Court's decision in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978)." H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. 122 (1990).[16] And more broadly, "the natural implication" of Congress's decision to enact a savings provision stating that *OPA 90* does not have preemptive effect is that Congress believed other statutes and regulations *did* preempt state law; that Congress found it necessary to specifically preserve state law against preemption by a particular enactment "presupposes a background of preemption." *Gade*, 505 U.S. at 100 (plurality opinion). See generally *Ray*, 435 U.S. at 174 (where some state laws expressly permitted, statute "impliedly forbids higher state standards").

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[16] In fact, at the time of the decision in *Ray* there were a number of statute-specific savings clauses that were very similar to the one now in OPA § 1018. See Deepwater Port Act of 1974, Pub. L. No. 93-627, § 19(a)(2), 88 Stat. 2126 (1975) (codified at 33 U.S.C. § 1518) ("Except as otherwise provided by this Act, nothing in this Act shall in any way alter the responsibilities and authorities of a State or the United States within any of the territorial seas of the United States."); Trans-Alaska Pipeline Authorization Act Pub. L. No. 93-153 § 204(c)(9), 87 Stat. 584 (1973) (codified at 43 U.S.C. § 1653) ("This subsection shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements"); Federal Water Pollution Control Act of 1972, Pub. L. 92-500 (codified at 33 U.S.C. § 1251(b)) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution * * * ."). Needless to say, the Court in *Ray* did not regard these provisions as having any bearing on the issues in that case.

The court of appeals' only response to these points was its assertion that Section 1018 "shapes the 'full purposes and objectives' of Congress * * * with respect to the entire legislative field of oil-spill prevention" — and that it does so even though it "expressly applies only to OPA 90." 148 F.3d at 1068 n.15. But even apart from the textual implausibility of the court's conclusion, its mode of analysis is insupportable. The notion that Congress should be deemed to have impliedly revoked the plenary regulatory authority granted the Secretary in many pre-existing statutes cannot be reconciled with the rule that implied repeals are disfavored. The Ninth Circuit's approach also would create paralyzing uncertainty about the regulatory power of federal agencies whenever Congress enacts a clause saving state authority in specified circumstances. And if a clause like Section 1018 may be read to displace regulatory authority in a wide and unpredictable range of settings, "surely only the most sporting of Congresses will dare say anything" expressly preserving state law. *Cipollone*, 505 U.S. at 548 (Scalia, J.). As a result, the court of appeals' approach could have the perverse effect of discouraging Congress from expressing its intentions regarding preemption in the statutory text, an outcome that is not in anyone's interest.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

-and-

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

v.

GARY LOCKE, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County; K. CARL LONG, Prosecutor of Skagit County; JAMES H. KRIDER, Prosecutor of Snohomish County; NORMAN MALENG, Prosecutor of King County; NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL and OCEAN ADVOCATES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONERS[1]

The Maritime Law Association of the United States (hereinafter "MLA") respectfully submits this brief as *amicus curiae* in support of the Petitioners, the United States of America and the International Association of Independent Tanker Owners.[2]

INTEREST OF AMICUS CURIAE

The MLA is a national bar association founded in 1899, with a membership of about 3,600 attorneys, law professors and others interested in maritime law. Its attorney members, most of whom are specialists in admiralty law, represent all maritime interests, including shipowners, charterers, cargo interests, port authorities, seaman, longshoremen, passengers, underwriters, and other maritime claimants and defendants.

The objectives of the MLA, as stated in its Articles of Association, are:

> to advance reforms in the Maritime Law of the United States, to facilitate justice in its

1. This Brief was authored by James Patrick Cooney of Royston, Rayzor, Vickery & Williams L.L.P., David J. Bederman, Professor of Law, Emory University Law School and Howard M. McCormack, of Healy & Baillie, L.L.P., President of the Maritime Law Association of the United States. No person or entity other than the Maritime Law Association made a monetary contribution to the preparation or submission of the Brief.

2. The MLA has received and filed concurrently with the filing of this Brief the written consents of Governor Gary Locke and the other state respondents the Natural Resources Defense Council, Washington Environmental Council and Ocean Advocates in both Nos. 98-1701 and 98-1706, the International Association of Independent Tanker Owners, the Petitioner in No. 98-1706 and the United States, Petitioner in No. 98-1701.

> administration, to promote uniformity in its enactment and enforcement, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives, the MLA has sponsored a wide-range of legislation dealing with maritime matters during its 100 years of existence, including the Carriage of Goods by Sea Act,[3] the Federal Arbitration Act,[4] and the Foreign Sovereign Immunities Act.[5] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[6]

The MLA assists in maritime projects undertaken by agencies of the United Nations, and works closely with the International Maritime Organization (IMO) in the formulation of uniform international maritime standards. The President of the MLA (or his delegate) serves as a member and legal advisor to the U.S. delegation to the IMO Legal Committee.

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3. 46 U.S.C. §§ 1300-1315.

4. 9 U.S.C. §§ 1 *et seq.*

5. 28 U.S.C. §§ 1330, 1602-1611.

6. *E.g.*, Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376; Convention of the International Regulations to Prevent Collisions at Sea, 28 U.S.T. 3459, *as amended*, T.I.A.S. 10672; United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

. The MLA is one of some 57 national maritime law associations constituting the Comité Maritime International,[7] seeking international uniformity in maritime laws through international conventions.

In 1975, prompted by the need for both national and international uniformity in maritime law, the MLA passed a resolution asserting that the MLA "considers it of the utmost importance and in the public interest that maritime law be uniform to the maximum extent possible throughout the United States." In 1986, the MLA by resolution reaffirmed its "support of the importance of maintaining national uniformity in maritime law" and approved "action, subject to the By-Laws, to express such support, including filing amicus briefs and supporting proposed legislation or other action which favors uniformity in maritime law, and opposing proposed legislation or other action which impairs uniformity in maritime law."

In furtherance of its policy with regard to uniformity, the MLA has appeared before this Court as *amicus curiae* on numerous occasions to argue in favor of uniformity in the substance and application of the Maritime Law of the United States.[8]

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7. Its members include the following countries: Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, Finland, France, Germany, Greece, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, D.P. R. Korea, Malaysia, Malta, Mauritanie, Mexico, Morocco, Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Singapore, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Russia, Venezuela and Yugoslavia.

8. *E.g.*, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Offshore Logistics, Inc.*

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SUMMARY OF ARGUMENT

The regulation of maritime commerce must be uniform and consistent on a national basis. This principle of Uniformity finds its basis in our Constitution and has been recognized since the beginning of the Republic.

In recent years, the United States has joined in international efforts through the International Maritime Organization to develop, implement and enforce a mandatory international legal regime designed to promote vessel safety and to prevent marine pollution. It has become a signatory to numerous international conventions establishing a comprehensive body of standards applicable to ocean going vessels. These international standards have been incorporated in statutes and regulations and are enforced by the U.S. Coast Guard. The statutes and regulations at issue in this case attempt to regulate the same vessel operations that are the object of the international and federal regulatory efforts.

The Washington statute and regulations are in conflict with international conventions and federal statutes and regulations. The court below failed to apply the necessary rule-by-rule conflict preemption test and erroneously failed to hold that the state statutes and regulations must fail under conflict preemption.

The international conventions dealing with vessel operations are so comprehensive as to occupy the entire field. The conventions are largely self-executing, but even if they are found not to be self-executing, the federal statutes and

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v. Tallentire, 477 U.S. 207 (1986); *Chick Kam Choo v. Exxon Corporation*, 486 U.S. 140 (1989); *Sisson v. Ruby*, 497 U.S. 358 (1990); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1996); *Exxon Co., U.S.A. v Sofec, Inc.*, 516 U.S. 1091 (1996); *Bouchard Transp. Co., Inc. v. United States*, __ U.S. __, 119 S. Ct. 1095 (Mem.) (1999).

regulations which seek to implement the standards contained in the conventions preempt the field. The court below should have held that the state statutes and regulations also fail under field preemption and that the Doctrine of Uniformity is applicable to the admiralty and maritime laws of the United States.

ARGUMENT

I. Washington's tanker regulations directly conflict with U.S. treaty obligations.

A. The United States has consistently sought to implement the International Maritime Organization's standards for vessel operations and safety.

From the earliest days of our nation, courts, legislatures and scholars have recognized that the regulation of waterborne commerce between the States and with foreign counties demands a uniform national approach and that it is an area to be dealt with primarily at the federal level.[9] More recently, the United States has joined in international efforts through the IMO to develop, implement and enforce an effective mandatory international legal regime designed to promote merchant vessel safety and prevent marine pollution by vessels.[10] It has become party to numerous international conventions and other agreements establishing comprehensive rules and standards for

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9. *See, e.g.*, The Federalist, Nos. 11, 13, 15, 24 (Hamilton), 64 (Jay) and 80 (Hamilton); *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1923).

10. *See* Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. Mar.L.& Com. 565 (1998) (Allen II). The International Maritime Organization is a specialized international agency of the United Nations established by convention in 1948. *See* IMO Website at http://www.imo.org.

merchant vessels, which have been incorporated into our domestic laws.[11]

The 1982 United Nations Convention on the Law of the Sea ("LOS Convention") is the framework for a mandatory international legal regime for the promotion of vessel safety and the prevention of marine pollution.[12] The LOS Convention places primary responsibility for regulating vessel safety and pollution prevention on the vessel's flag state and requires the flag state to meet international standards with regards to: (1) the construction, equipment and seaworthiness of ships; (2) the manning of vessels and the training and working conditions of their crews; and (3) the maintenance of signals and the prevention of collisions.[13] As a general matter, vessels certified as complying with applicable international standards must be allowed access to the territorial waters and ports of other nations (referred to either as "coastal" or "port" states). Port states have a duty to detain vessels determined upon inspection to be in violation of applicable international standards.[14]

The international standards that are enforced under the LOS Convention include the 1974 Convention for the Safety of Life at Sea and its 1978 Protocol ("SOLAS");[15] the 1973

11. *See, e.g.*, 46 U.S.C. §§ 3710(a) and 3711(a).

12. Entered into force Nov. 16, 1994, U.N. Doc. A/Conf.62/122, *preprinted in* 21 I.L.M. 1261 (1982), and in 6B Benedict on Admiralty, Doc. No. 10-6 (7th rev. ed. 1997). The LOS Convention was submitted to the Senate on October 7, 1994, and is pending ratification. S. Treaty Doc. 103-39, 103d Cong. (1994).

13. *See* Allen II, *supra* note 10 at 566-567.

14. *See* Allen II, *supra* note 10 at 569-575.

15. International Convention for the Safety of Life at Sea, London, 1974, 32 U.S.T. 47, T.I.A.S. No. 9700; Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, 1974, 32 (Cont'd)

Convention for the Prevention of Pollution from Ships and its 1978 Protocol ("MARPOL");[16] the 1978 Convention of Standards of Training, Certification and Watchkeeping for Seafarers ("STCW");[17] the 1972 COLREGS Convention;[18] the 1969 Convention on Load Lines;[19] and the International Convention Concerning Minimum Standards in Merchant Ships ("ILO Convention 147").[20]

SOLAS specifies minimum international standards for construction, equipment, stability, machinery and electrical equipment, lifesaving appliances and fire detection and extinguishing equipment. Chapter V of the Convention establishes operational requirements and provides for mandatory ship reporting systems. The SOLAS amendments of 1994 require the implementation of the International Safety Management Code ("ISM Code"), which established an international standard for the safe management and operation of ships.[21] SOLAS provides for enhanced port state control,

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U.S.T. 5577, T.I.A.S. 10009 (a 1988 Protocol, S. Treaty Doc. No. 2, 102d Cong., at 83 (1191), is not yet in force).

16. International Convention for the Prevention of Pollution from Ships, T.I.A.S. No. 10561; 1978 Tanker Safety and Pollution Prevention Protocol (MARPOL), *reprinted in* 17 I.L.M. 546 (1978), entered into force Oct. 2, 1983.

17. Entered into force, Apr. 28, 1984; 1995 Amendments entered into force Feb. 1, 1997.

18. T.I.A.S. No. 8587, *reprinted in* 12 I.L.M. 734 (1973), entered into force July 15, 1977.

19. International Convention on Tonnage Measurement, T.I.A.S. No. 6331, entered into force July 18, 1982.

20. Convention Concerning Minimum Standards in Merchant Ships, *reprinted in* 15 I.L.M. 1288 (1976), entered into force Nov. 23, 1981.

21. The 1994 Amendments made the Code mandatory beginning July 1, 1998 for most vessels, including tankers.

including authority for the port state authorities to assess vessel crew performance in executing operational requirements.[22] In the United States, the Coast Guard has been assigned the responsibility of enforcing SOLAS requirements as the designated port state authority.[23] MARPOL establishes international standards for vessel design, construction and equipment standards which are enforced by the port state authority.[24] The STCW establishes international standards of the training, certification and watchkeeping for seafarers. While manning standards are established by SOLAS,[25] the Convention requires an adequate knowledge of the English language to obtain certification,[26] establishes in-port and underway watchkeeping requirements[27] and fixes minimum crew rest periods.[28]

SOLAS, MARPOL, the ISM Code and STCW have been implemented for United States flag vessels by various provisions of Titles 33 and 46 of the U.S. Code and regulations issued by the U.S. Coast Guard. Enforcement of convention standards are accomplished with respect to foreign vessels calling in U.S. ports through the United States Port State Control Initiative.[29]

The statute and regulations of the State of Washington at issue here[30] attempt to impose standards regarding vessel safety

22. SOLAS ch. XI, re. R; IMO Res A.787(19).

23. *See* Allen II, *supra*, note 10 at 582.

24. *See* Allen II, *supra*, note 10 at 583-585.

25. SOLAS ch. V, reg. 13; *see also* IMO Res. A.481(XII) (1981).

26. STCW Convention art. II, reg. 2.

27. STCW Annex, ch. VIII and STCW Code § A-VIII.

28. *Id.* STCW Code § A-VIII/1; *see* Allen II, *supra*, note 13, at 586.

29. 59 Fed. Reg. 36,826 (1994). *See generally*, Allen II, *supra*, note 10, at 588-594.

30. Oil and Hazardous Substances Spill Prevention and Response Act, 1991 Wash. Laws ch. 200 Wash. Rev. Code ch. 88.46.010 *et seq.*; Wash. Admin. Code §§ 317-21-010 *et seq.*

and the prevention of pollution that differ from the standards set out in the IMO conventions or in federal statutes and regulations. The Ninth Circuit held that the state statute and regulations are not preempted by either federal law or by international convention.[31] If this decision is allowed to stand, the ability of the federal government, and the U.S. Coast Guard in particular, to effectively regulate the operation of tankers and other vessels calling on the ports of this nation will be significantly eroded. The way will be open for the States and their political subdivisions[32] to effectively displace the federal government in its role as the principal regulator of our maritime commerce.

The possible displacement of the federal government as the principal regulator of maritime commerce is made all the more troublesome when considered in the context of the IMO Conventions already in place and the continued growth of international law dealing with safety at sea and the prevention of vessel pollution. If, indeed, statutory efforts of a state to regulate the operation of tankers and other ocean going vessels cannot be preempted by treaty or by federal statute and regulation, the stage will be set for the fragmentation of vessel regulation in the United States and the collapse of the current approach to vessel safety through a mandatory international

31. *Int'l Assoc. of Indep. Tanker Owners v. Locke*, 148 F.3d 1053 (9th Cir. 1998), *reh. denied*, 159 F.3d 1220 (9th Cir. 1998) (hereafter: "*Intertanko*").

32. § 1018 of OPA90, upon which the Ninth Circuit's preemption analysis is based, preserves the authority of States and *their political subdivisions* to impose requirements with respect to the discharge of oil. 33 U.S.C. § 2718b. Arguably, the decision for which review is being sought allows not only the states, but state port authorities, municipalities and other political subdivisions to regulate vessel operations concurrently with the federal government. Likewise, OPA90 applies to virtually any ocean-going vessel that uses petroleum based fuel, so that state regulation could apply to vessels other than tankers.

legal regime. Efforts to provide uniform rules and regulations consistent with the various international conventions regarding safety at sea and the prevention of pollution to which the United States is a signatory will be frustrated. Any sense of uniformity in the area of maritime regulation will be lost and a patch work of local standards will come into existence, creating "precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent."[33]

It is this threat to the uniformity of the maritime law of the United States that constrains the MLA to appear before this Court as *amicus curiae* to urge that the decision of the Court of Appeals in this case be reversed. The very nature of maritime commerce demands that its regulation be uniform and consistent both on a national and international basis. To encourage and facilitate ocean borne commerce, to provide for the safe operation of vessels coming to our shores and to meet our international treaty obligations, uniform and consistent national standards are necessary. For these reasons, the primary responsibility for the regulation of vessel operation and safety must be left, as a practical matter, to the federal government. The state statute at issue here encroaches and overlaps into an area that must remain nationally uniform and to that extent should be preempted by federal law and regulations under the Supremacy Clause of the U.S. Constitution.[34]

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33. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 286 (1977).

34. The Constitutional basis of the preemptive federal role in the regulation of maritime commerce is clear. Article I, Section 8, Clause 3 (The Commerce Clause) states: "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states. Article I, Section 8, Clause 18 (The Necessary and Proper Clause) states that "The Congress shall have power * * * To make all laws which shall be necessary and proper for the carrying into Execution the foregoing Powers * * *. 'Article III, Section 2, Clause 3 (The Admiralty Clause) states:' The judicial power shall extend * * * To all cases of

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B. Washington's tanker regulations directly conflict with the federal statutory and regulatory scheme implementing IMO standards for tanker operations and safety.

At issue in this case is a statute of the State of Washington directed to the protection of state waters from oil pollution by oil tankers and regulations issued pursuant to that statute dealing with, *inter alia*, event reporting, operating procedures and watchkeeping practices, navigational practices, engineering practices, crew training, crew work hours, language requirements, and record keeping. The same areas are dealt with by Oil Pollution Act of 1990,[35] the Ports and Waterways Safety Act ("PWSA"),[36] a comprehensive body of regulations issued by the United States Coast Guard pursuant to these statutes,[37] and a number of international treaties and conventions dealing with maritime safety and the environment.[38]

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admiralty and maritime jurisdiction." It is now firmly recognized that these provisions empower Congress to make maritime law. *See Panama*, *supra*, note 9. *Cf. Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990), noting that "Maritime tort law is now dominated by federal statute . . ." Article VI, Section 2, (The Supremacy Clause) makes federal maritime law binding on the states: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

35. Pub. L. No. 101-380, 104 Stat. 484 (1990), as amended.

36. Pub. L. No. 92-340, 86 Stat. 424 (1972).

37. *E.g.*, 58 Fed. Reg. 27,268 (1993) (regulating watch keeping practices); 60 Fed Reg. 24,767, 24,771 (1995) (regulating steering gear); 58 Fed. Reg. 68,274, 68,277 (1993) (regulating drug testing)

38. *See, infra*, pp. 7-8.

The PWSA contains two titles. Title I is codified at Sections 1221-1227 of Title 33 U.S.C. and authorizes the establishment of vessel traffic control systems, the restriction of the operations of tankers not having specified capabilities and the negotiation of international treaties on vessel safety. Title II is codified in Title 46 of the U.S. Code and requires the Secretary of Transportation to adopt uniform federal regulations for the design, construction, equipment, and operation of tank vessels,[39] and delegates the Secretary's obligations to issue regulations to the U.S. Coast Guard.[40] The PWSA was supplemented in 1978 by the Port and Tanker Safety Act ("PTSA"),[41] which requires the Secretary of Transportation to establish regulations dealing with vessel management, drug and alcohol testing, seafarer training and qualifications, casualty reporting, seafarer discipline, manning, work hours, pilotage, and language proficiency requirements. Finally, OPA90 directly imposes several requirements including a provision for random drug and alcohol testing,[42] limited working hours for tanker crews,[43] and a requirement that tankers be equipped with double hulls.[44]

The Ninth Circuit held below that the Washington statute and regulations are not preempted by OPA90, PWSA, PTSA, or by any relevant international treaty or convention. In holding that the state statute was not preempted by OPA90, the Court relied on § 1018 of OPA90[45], which provides that "nothing in this Act ... shall affect, or be construed or interpreted as preempting, the authority of any State or political subdivision

39. 46 U.S.C. § 3703.
40. 46 U.S.C. § 2104.
41. 46 U.S.C. §§ 9101, 9102.
42. 46 U.S.C. § 7702.
43. 46 U.S.C. § 8104(n).
44. 46 U.S.C. § 3703a.
45. 33 U.S.C. § 2718(a).

thereof from imposing any additional liability, or requirements with respect to ... the discharge of oil or the pollution by oil within such State," or that "the authority of the United States or any State or political subdivision thereof ... to impose additional liability or additional requirements ... relating to the discharge, or substantial threat of a discharge of oil." The court assumed without discussion that the state regulations dealing with vessel operations constituted "oil spill prevention requirements" and that such regulations were "with respect to" or "related to" the discharge of oil and thus could not be preempted by anything contained in OPA90.

In concluding that neither the PWSA nor the PTSA preempted the Washington statute and regulations, the Ninth Circuit held:

> In the field of tanker regulation, the overarching purposes of Congress are best revealed by OPA90. As the most recent federal statute in the field, OPA90 reflects "the full purposes and objectives of Congress." (Citing *Hines vs. Davidowitz*, 312 U.S. 52, 67 (1941)), better than the PWSA, the PTSA or the Tank Vessel Act, all of which OPA 90 was designed to complement.[46]

The Court went on to hold:

> Section 1018 of OPA 90 sheds considerable light upon the purposes and objective of Congress in effectuating a federal scheme of tanker regulation. That provision demonstrates Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability and compensation.[47]

Under the reasoning utilized by the court below, the regulation of vessel operations by the State of Washington is

46. *Intertanko, supra*, 148 F.3d at 1062.
47. *Id.* at 1062.

principally directed to the prevention of oil spills, which is "in respect to" the discharge of oil and, as such, the state regulation of vessel operation cannot be preempted under § 1018 of OPA90. OPA90 is presumed by the Court to be the definite expression of Congressional purpose and objective in the area of vessel regulation, so that the saving effect of § 1018 is extended to all federal statutes dealing with vessel regulation.

The Ninth Circuit also held that the Washington statute and regulations are not preempted by several conflicting international treaties, including SOLAS, MARPOL, the LOS Convention International Convention for the Safety of Life at Sea, the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, the Multilateral International Regulations for Preventing Collisions at Sea, and the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region[48] relying on its decision in *Chevron U.S.A., Inc. v. Hammond*,[49] which held:

> [T]he PWSA/PTSA does not mandate strict international uniformity. Although the legislative history of the PWSA/PTSA refers to congressional intent to abide by international agreements regarding the regulation of tankers, the statutes nonetheless give the Coast Guard specific authority to establish stricter requirements than those set by international agreements. *This indicates Congress' view that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction.*[50]

48. Dec. 19, 1979, *United States-Canada*, 32 U.S.T. 377, T.I.A.S. No. 9706.

49. 726 F.2d 483 (9th Cir. 1984), *cert. denied sub nom., Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140 (1985).

50. *Id.* at 493-94 (emphasis in original).

The key component of the preemption analysis utilized below is the broad construction placed on § 1018 of OPA 90 rather than the analysis employed by this Court in *Ray v. Atlantic Richfield Co.*[51] and ostensibly relied on by the court below. The construction placed on § 1018 would seem to protect from preemption any state vessel regulation that might contribute in the broadest sense to the prevention of vessel pollution. This construction cannot be sustained. First, there is no authority either in the legislative history or the case law to support the broad construction placed on § 1018. The language of § 1018 is substantially identical to the saving clauses in the Clean Water Act,[52] the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[53] the Trans-Alaska Pipeline Authorization Act (TAPAA),[54] and the Deepwater Port Act.[55] The language has never been construed to provide protection from preemption beyond the areas of state imposed liability for pollution and response and removal activities.[56] A consideration of the legislative history of OPA90 also creates serious doubt that there was ever any Congressional intent to extend the effect of § 1018 to pollution prevention regulation or even to the various legislative initiatives that were ultimately consolidated into OPA90.[57]

51. 435 U.S. 151 (1978).

52. 33 U.S.C. § 1321(o)(2).

53. 42 U.S.C. § 9614(a).

54. 43 U.S.C. § 1656(e)(1).

55. 33 U.S.C. § 1517(k).

56. *See, e.g., Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir 1979); Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part III)*, 30 J. Mar.L.& Com. 85, 124 (1999). (Allen III)

57. *See generally, Intertanko*, 159 F.3d 1220 (9th Cir. 1998) (Graber, CJ, dissenting).

For the Ninth Circuit's preemption analysis to work, it must be accepted that the primary purpose behind the regulation of vessel operations is oil spill prevention. Oil spill prevention, however, is only a subset of the many purposes to which the regulation of vessel operations is directed. For instance, regulations directed to the prevention of vessel collision may be seen as directed to the prevention of oil spills since collisions may result in oil spills. Such regulations, however, are more realistically seen as regulations directed to the prevention of vessel collision, as well as the several consequences that may result from a collision including loss of life, personal injury, damage to property, as well as damage to the environment. In the real world, the prevention of oil spills or environmental damage is only one, and perhaps not the primary, purpose behind the regulation of vessel operations. It would seem that the need to protect human life and safety must be recognized as primary. Viewed in this way, the federal regulation of vessel operations is not directed exclusively to the prevention of oil spills and transcends the limited purposes and objectives the Court below implicitly assigned to it. Finally, there is nothing to suggest that § 1018 of OPA90 was intended to relieve the states of the preemptive effect of international treaties dealing with marine safety or pollution prevention.[58]

C. The decision below fails to conduct the necessary rule-by-rule conflict preemption test required by this Court in *Ray*.

Instead of treating each of the federal statutes that deal with vessel safety separately to determine their preemptive effect on conflicting state regulation, the court below assumed without analysis or authority that OPA90 reflected "the full purpose and objectives of Congress" better than prior legislation since it was the most recent federal statute in

58. Allen III, *supra*, note 56 at 132.

the field.[59] By doing so, the court reaffirmed the underlying assumption implicit in its overall preemption analysis that the primary purpose of vessel regulation is the prevention of pollution. Going one step further, the court applied its expansive construction of § 1018 to the entire field of tanker regulation and concluded that § 1018 was a key to the determination of the principal purposes and objectives of Congress in effectuating a federal scheme of tanker regulation which demonstrated "Congress's willingness to permit state efforts in the areas of oil-spill prevention."[60] This approach is logically unsupportable. It totally disregards the strategy that has been followed by the federal government in participating in a mandatory international vessel regulation regime that is implemented domestically through statute and Coast Guard regulation. The purposes and objectives of the PWSA and the PTSA must be considered apart from the purpose and objective of Congress in enacting OPA90 or even the Congressional purpose and objective in enacting the portions of OPA90 dealing with pollution prevention. There is every indication that in affirmatively directing the Secretary of Transportation and the Coast Guard to issue definitive regulations regarding vessel safety and spill prevention in the PWSA and the PTSA, as well as in Title IV of OPA90, it was not the purpose or objective of Congress to permit the states to enter the field of vessel regulation. To the contrary, the clear implication is that Congress intended for there to be a uniform national approach to vessel regulation consistent with the international treaties and conventions dealing with the various aspects of vessel operation, safety, and pollution prevention to which the United States is a party. The Ninth Circuit's failure to focus on the totality of the regulatory approach of the United States to vessel safety and pollution prevention is fatal to its

59. *Intertanko*, *supra*, 148 F.3d at 1062, *citing Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

60. *Intertanko*, *supra*, 148 F.3d at 1062.

conflict preemption analysis. A proper analysis can lead to no other conclusion but that the comprehensive approach to the regulation of vessel operations taken by the federal government in this area requires the preemption of conflicting state statutes and regulations.

II. The adherence of the United States to IMO standards constitutes a field preemption of Washington's tanker regulations.

A. Broad adherence to international regulatory schemes, even non-self-executing treaty obligations, can give rise to a field preemption where state regulations affect maritime commerce.

The United States is a party to numerous conventions dealing with vessel safety matters, including SOLAS, MARPOL, the ISM Code and STCW, that expressly prohibit the parties to the conventions from imposing standards stricter than those imposed by the conventions on foreign flag vessels calling in domestic ports.[61] These conventions seek to mandate compliance with specific standards regarding the vessel design, construction, maintenance, manning, personnel training, and management of vessels imposed by the vessel's flag state (nation), in exchange for assurance by the port state (nation) that compliance with the mandatory international standards will be sufficient for vessels to gain entry to the waters of the port state.[62] If this international vessel regulatory regime is to function in our federal system, international conventions entered into by the United States must be accorded preemptive effect over state regulatory efforts seeking to impose standards in excess

61. *See, e.g.*, SOLAS, Part II, note 420, art. VI(d), which provides: "All matters which are not expressly provided for in the present Convention remain subject to the legislation of the Contracting Governments."

62. *See generally*, Allen II, *supra*, note 10.

of convention requirements, no matter how desirable or benign the state regulations may appear.

The court below gave no consideration to how the purposes and objectives of the relevant international conventions affect the ability of the states to impose vessel regulations. Instead, the court relied on its decision in *Chevron U.S.A., Inc. v. Hammond*[63] to hold that treaties can create only minimum standards and that strict uniformity is not required by international treaties. Having already concluded that all of the relevant congressional purposes and objectives of tanker regulation were embodied in OPA90, and that nothing in OPA 90 would be frustrated by the Washington regulations, the court found it unnecessary to consider any legislative or foreign policy objectives that Congress and the President may have sought to obtain through the various conventions and treaties to which the United States is a party that impact the regulation of vessel safety. In doing so, the court cut short the conflict preemption analysis which it was required to carry out to determine whether the Washington law and regulation stands as an obstacle to the accomplishment and execution of the "full purposes and objective of Congress."[64] Had the proper analysis been carried out, there can be little doubt that the court would have found the Washington statute and regulations preempted by the various international conventions that impact the field of vessel regulation.[65]

63. *Supra*, note 49.

64. *See California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989); *Hines v. Davidowitz*, *supra*, note 59.

65. As noted by one commentator, "[n]othing in OPA90 or its legislative history and no authority cited by the court in Intertanko II, demonstrates a congressional intent to relieve the states of the preemptive effect of the IMO-sponsored marine safety or pollution prevention conventions." Allen, III at 132. Indeed, if it was not Congress' understanding that the states were generally preempted by

(Cont'd)

It is asserted that the treaty provisions relied upon by Petitioners are not self-executing and, therefore, cannot be regarded as having field preemptive effect. It is submitted, however, that the IMO Conventions at issue are substantively self-executing, but, even if they are not, the conclusion that they nonetheless exert preemption of contrary state regulations is not altered. For example, even in the absence of an implementing federal statute, the courts have treated the SOLAS requirements as self-executing or have applied them as a component of the general maritime law.[66]

More generally, international conventions which purport to restrict the actions of a signatory are self-executing. In *Commonwealth v. Hawes*[67], a 1878 Kentucky Supreme Court decision cited by this Court as a "very able" statement of the law in *United States v. Rauscher*,[68] it was observed that:

(Cont'd)
federal statutes regulating maritime affairs, it would not have been necessary to reserve to the states a role in the liability and response aspects of marine pollution. For other commentaries on the general area, *see*, Robert H. Nicholas, Jr. *Federal and State Preemption Regarding Vessel Construction and Operation*, 73 Tulane Law Review 1 (1999); Charles L. Coleman, III, *Federal Preemption of State "BAP Laws; Repelling State Boarders in the Interest of Uniformity*, 9 U.S. F. Mar. L.J. 305 (1997).

66. *See Complaint of Damodar Bulk Carriers, Ltd.*, 903 F.2d 675 (9th Cir. 1990) (holding that "[t]his circuit recognizes SOLAS as having the status of law enforceable in American courts.") (*citing Alkmeon Naviera, S.A. v. M/V Marina L*, 633 F.2d 789, 793 (9th Cir. 1980)); *See United States v. Ultramar Shipping Co.*, 685 F. Supp. 887 (S.D.N.Y. 1987), *aff'd mem.*, 854 F.2d 1315, 1988 AMC 2408 (2d Cir. 1988) (holding that "[t]he SOLAS Conventions 'represent a uniform set of internationally recognized navigational rules and thus they have the status of general maritime law.' ").

67. 76 Ky. 697 (1878).

68. 119 U.S. 407, 427-28 (1886).

> When it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."[69]

Even assuming that the relevant IMO Conventions are non-self-executing such international agreements are still entitled to field preemptive effect. Whether an international convention is self-executing may bear on the question of conflict preemption absent enabling legislation. However, if the treaty has been implemented by an Act of Congress, such action may well give rise to a specific clash with state legislative action. Field preemption operates more subtly. As has already been noted here, the question is whether Congress has pervasively sought to legislate in a particular field, giving rise to a clear implication that state regulation is simply unacceptable. In these circumstances, the ratification of STCW, MARPOL 73/78, the COLREGS, and SOLAS by the United States, in addition to consistent efforts by Congress to give sanction to international efforts to regulate vessel operations, clearly manifest a Congressional intent to field preempt state regulations regarding such operations.

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69. *Id.* at 702-03. *See also United States v. Decker*, 600 F.2d 733 (9th Cir.), *cert. denied*, 444 U.S. 855 (1979); *Watson v. United States*, 592 F. Supp. 701 (W.D. Wash. 1983); Restatement of Foreign Relations Law of the United States § 111, rptr's note 5 (1987)

B. Washington's BAPS for tankers cannot be harmonized with international standards.

At the heart of this matter is the heightened awareness of and concern for the environment resulting from several significant and well-publicized oil spills involving vessel casualties, the most notable being the Exxon Valdez spill in 1989 which lead to the passage of the *OPA90* and the Washington statute here at issue. The policy determination made by Congress to allow the states and their political subdivisions a role in the area of maritime environmental regulation raises the question of how to reconcile the interests of the several States to protect their environments with the need for uniform and consistent regulation of maritime commerce. There is no question that the States have the inherent right under their police power to prohibit the discharge of pollutants into the environment within their boundaries, to establish standards regarding the response and abatement of such a discharge, and to impose civil and criminal liabilities to deter such harm to the environment. Implicit in this right to prohibit pollution is the interest of the states in the implementation of laws and regulations aimed at the prevention of pollution within their borders. In the maritime context, however, the environmental interests of the States must be balanced against the federal responsibility to provide for the uniform and consistent regulation of maritime commerce.

In this case, the effort of the State of Washington to protect its state waters and shores from oil pollution brings it into direct conflict with the efforts of the federal government to address essentially the same concerns on a national and international level. Washington has issued broad and comprehensive regulations establishing standards in the areas of incident reporting, watch keeping and lookout practices, bridge resource management, navigational practices, engineering practices, testing of engineering, navigational and propulsion systems,

emergency procedures, record keeping, personnel training, drug and alcohol testing, personnel job performance evaluation, work hours, language proficiency, and management practices. All of these regulations are for the stated purpose of preventing pollution. The decision below has upheld the right of Washington to regulate these areas of vessel activity notwithstanding the fact that these areas are dealt with comprehensively by federal statute and regulations and international convention. Vessels that call in ports of the State of Washington must comply not only with the standards and requirements imposed by federal regulation, but also the additional and more stringent standards and requirements of the State of Washington.[70]

If the decision below is allowed to stand, the legal framework on which we regulate our maritime commerce will become fragmented, uncertain, and unnecessarily contentious.[71] Any effort to maintain this dual state-federal regulation of vessel operations is both constitutionally impermissible and highly impracticable. If there is an area where field preemption should be upheld, it is in the area of merchant vessel regulation.

III. Federal Preemption in the Field of Maritime Commerce may be More Readily Established Than in Other Areas of Federal Legislative Authority.

As this Court noted in *Ray v. Atlantic Richfield Co.*[72], preemption may be express, implied from the context of an Act

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70. Unfortunately, the problem is not restricted to vessel actually calling on ports within the State of Washington, since the Washington statute would apply to vessels required to pass through state waters en route to ports in Canada, implicating our treaty obligations with Canada and the right of innocent passage generally.

71. As noted the Petition of the United States of America for Writ of Certiorari in No. 98-1701 at 26, several nations have formally protested the Washington state regulations.

72. 435 U.S. 151 (1978).

of Congress, or be required in the case of an actual conflict in legislative direction. It is true that this Court has allowed state regulation of certain offshore activities in the face of Congressional silence.[73] However, where state regulation ostensibly impacts the modalities of maritime commerce, the typical presumptions against federal preemption as noted by this Court in *Cipollone v. Liggett Group, Inc.*[74] arguably do not apply.

The Court in *Ray* certainly contemplated the particular problems posed by state regulation in the field of maritime commerce when it observed that

> Under the relevant cases, one of the legitimate inquiries is whether Congress has either explicitly or implicitly declared that the States are prohibited from regulating the various aspects of oil-tanker operations and design with which the Tanker Law is concerned. As the Court noted in *Rice, supra*, 331 U.S. at 230:
>
> > [The congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.[75]

73. *See Skiriotes v. Florida*, 313 U.S. 69 (1941) (sponge diving); *Alaska v. Arctic Maid*, 366 U.S. 1991 (1961) (taxation); *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325 (1973) (pollution regulation).

74. 505 U.S. 504, 515-16 (1992).

75. 435 U.S. at 157 (citations omitted).

> It has always been the understanding of this Court that regulation of maritime commerce — especially in the actual operation of oceangoing vessels involved in international trade — was a matter in "which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[76]

Although it is not the MLA's intent to resurrect the Commerce Clause challenges to the Washington BAPs, disposed of below (and not renewed here), this Court's related jurisprudence as to the nature of federal maritime lawmaking competence, certainly has an impact on the relevant standard to be applied in field preemption cases involving maritime regulation. The MLA believes that these precedents strongly counsel in favor of a holding of federal field preemption of all state regulations that purport to affect the operations of coastwise or international commerce by sea.

Although this point seems self-evident, it may be helpful to discuss the *locus classicus* of the rule of federal supremacy in the admiralty field. Prior to this Court's 1917 decision in *Southern Pacific Co. v. Jensen*,[77] there was no doubt that an Act of Congress could preempt contrary state statutes and state decisional law in the admiralty field. What was more uncertain was whether state maritime legislation was somehow restrained even before affirmative Congressional action. In short, the question was whether the jurisdiction-granting Admiralty Clause of Article III of the Constitution had the same dormant aspect as the Commerce Clause in Article I. *The LOTTAWANNA*,[78] and *Workman v. Mayor, City of New York*,[79] certainly implied such with their emphasis on distinguishing

76. *Id.*

77. 244 U.S. 205 (1917).

78. 88 U.S. (21 Wall.) 558 (1874).

79. 179 U.S. 552 (1890).

local sorts of legislation. It remained for *Jensen* to confirm the doctrine in the most express manner possible.

"Considering our former opinions," Justice McReynolds began,

> it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which should prevail throughout the country. [citations omitted] And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. [citing *The LOTTAWANNA* and *Workman*][80]

The Court frankly acknowledged that ". . . it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation."[81] While states *could* constitutionally impose liens on resident vessels, fix pilotage fees, and give the right to recover in death actions,

> no such [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international or interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which same law was

80. 244 U.S. at 215.

81. *Id.* at 216.

> incorporated by our national laws by the Constitution itself.[82]

This is the essence of *Jensen*'s uniformity doctrine and the dormant admiralty clause. The Court's holding obviously recognized the possibility of express preemption by Congress, but the concern was plainly focused on preventing states from legislating at variance with "the proper harmony and uniformity of that law in its international or interstate relations."

Jensen has never been repudiated and it retains vitality today, particularly in the core areas of admiralty, of which the regulation of oceangoing vessel operations must be considered one. In this Court's latest enunciation of the subject, in *American Dredging Co. v. Miller*,[83] it made clear the central purposes of federal supremacy in the maritime field. The Court's opinion unequivocally affirmed the continued vitality of *Jensen*, even while noting that "[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our jurisprudence."[84]

Washington asserts that the enactment of its own BAPs for tanker operations, does not offend uniformity. This cannot be true. As already noted above, any attempt to impose particular operational standards on tanker activities in state waters, inevitably produces a patchwork quilt of regulation. Even if such BAPs do not require "hardware" changes in a ship's construction, design and equipment ("CDE" standards), they may none too subtly affect manning and training requirements for a vessel. Washington's "English-only" and watchkeeping rules may, for example, require costly and logistically-difficult

82. *Id.* at 216.

83. 510 U.S. 443 (1994).

84. *Id.* (comparing *Kossick v. United Fruit* Co., 365 U.S. 731 (1961) with *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955)).

crew transfers in order to ensure compliance. If Canada reciprocates, and a vessel's next port-of-call is Vancouver, will that vessel than have to be crewed by individuals fluent in both French and English? Similarly, Washington's training requirements might require that all watch standing officers be trained by organizations certified by the State of Washington.

Although the Washington BAPs that the court below validated appear innocuous and a legitimate exercise of a state's police power, they nonetheless impose substantial burdens on international maritime commerce. Given the nature of a long-standing and well-conceived international approach to regulation of tanker safety, Congress's manifest approval of such an international scheme, and the background principles of federal supremacy in this core area of maritime lawmaking, this Court should hold that state regulations for operations of tankers engaged in international commerce are field preempted.

CONCLUSION

The decision of the United States Court of Appeals in this case should be reversed and the statutes and regulations of the State of Washington held to be preempted under the Supremacy Clause of the U.S. Constitution. Under the Constitution, the admiralty and maritime laws of the United States, including laws dealing with the operation of vessels, their manning, the training of their crews, and the like, are to be nationally uniform. On a practical level, the regulation of vessel operations by the individual states is inconsistent with the mandatory regulatory regime in which this nation participates and will cause a level of fragmentation that will frustrate any national or international effort to regulate vessel operations.

Respectfully submitted,

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OCTOBER TERM, 1999

UNITED STATES OF AMERICA,
PETITIONER

v.

GARY LOCKE, OF THE,
STATE OF WASHINGTON, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE PACIFIC MERCHANT SHIPPING ASSOCIATION IN SUPPORT OF PETITIONERS

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No. 98-1701
No. 98-1706

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

UNITED STATES OF AMERICA,
Petitioner,

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,
Respondents.

BRIEF OF THE PACIFIC MERCHANT SHIPPING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

I. SUMMARY OF ARGUMENT[1]

The decision of the United States Court of Appeals for the Ninth Circuit in this case—holding that regulations of the State of Washington relating to vessel manning, personnel qualifications and operations are not preempted by federal law—is squarely in conflict with this Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 55 (1978). While the federal and state governments share control over some matters relating to pollution prevention, control, and enforcement, as well as pilotage in local waters, the federal government has assumed and expressed exclusive control over vessel design, construction, operation, repair, maintenance, equipping, personnel qualifications, manning (including the duties and training of personnel) and general navigation. State

[1] This brief was authored in whole by counsel for Amicus Curiae, and no party other than *Amicus Curiae* made a monetary contribution to its preparation or submission.

and local governments are not free to conclude that a vessel and its personnel—approved by the federal government to navigate in waters of the United States—must meet higher standards to navigate in waters within state boundaries.

II. INTEREST OF AMICUS CURIAE

The Pacific Merchant Shipping Association ("PMSA") is a trade association that represents foreign and domestic shipowners and operators as well as their agents and other maritime entities on the West Coast of the United States. Its predecessor organization was established in 1919. PMSA's members own, operate, manage or represent United States and foreign flag tankers, dry bulk vessels, vehicle carriers, ferry and passenger vessels, tugs and barges, container ships and general cargo vessels. PMSA represents 75% to 80% of the total vessel tonnage calling at San Francisco Bay and Los Angeles area ports. A substantial portion of that tonnage also transits Washington waters enroute to or from California ports.

By an overwhelming margin, most of the exports from and imports into the United States move by water. In significant part, those goods are moved to and from ports located on the West Coast. More than 220 million tons of dry cargo, valued in excess of $660 billion, moved through Ports in Washington, Oregon and California in 1998, an increase of about 20% since 1993.

In 1998, more than 2,900 ships arrived at and departed from San Francisco Bay ports. Of these, 660 were tanker vessels. In the same year, more than 3,100 ships called at Los Angeles area ports. Of these, more than 700 were tanker vessels. Approximately 1,830 ships, at least 290 of which were tanker vessels, called at ports in Puget Sound in the State of Washington, and approximately 1,879 ships, at least 138 of which were tanker vessels, called at Portland, Oregon. The majority of these vessels called at both foreign and United States ports during the same voyage. These statistics are representative of past years and 1999 to date (except for tanker calls, which have temporarily increased in 1999 due to California refinery shutdowns and delays).

Frequently ships, both liner and tramp,[2] that call at ports on the West Coast of the United States call at more than one port during the voyage. Often these ports are in different states, as is the case with a significant number of liner trade vessels that call at multiple West Coast states on the same voyage. For example, as shown on Addendum I, in an approximate 30 day period around October, 1999, 111 liner container vessels (of up to 91,560 gross tons with capacity up to 6,000 twenty-foot intermodal containers), scheduled to call at Washington ports or navigating its waters, were also scheduled to call at one or more other West Coast states on the same voyage. This is representative of usual monthly calls. From January to September 30 of this year, 2,604 tankers arrived at and departed from ports of the San Francisco Bay Area, Long Beach and Los Angeles. Of those, 600 tankers arrived from ports of other states and 571 tankers departed those California ports for ports of other states. 276 of those tankers' voyages were to or from Washington waters.[3]

The West Coast destination port of PMSA member tramp tanker vessels or tramp cargo vessels is also often changed, mid-voyage, from a port in one state to a port in another state. This occurs for a variety of reasons. For example, while a vessel is enroute, its cargo may be sold to a buyer or buyers who designate a new discharge port or ports, or delivery time demands may change, or congestion may develop at the original destination as a result of too many vessels at port or conditions ashore at the ocean terminals. There are numerous other contingencies in the world of international trade that can result in a change of ports during a vessel's ocean transit.

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[2] Tramp vessels do not have regular scheduled ports of call (as do liner vessels) and trade according to cargo demand and availability.

[3] The liner container calls were published in the September 30, 1999 edition of the Journal of Commerce Shipcards. The West Coast 1998 dry cargo statistics were provided by the Pacific Maritime Association records. The other vessel statistics were provided by the Marine Exchange in San Francisco and Los Angeles.

The twenty-seven PMSA members who operate foreign flag vessels maintain uniform and fleetwide training, record keeping, reporting, licensing and certification standards for their masters, officers, crew and vessels in accordance with each member's flag state regulations and standards set in applicable treaties, conventions and international agreements under which the vessels are issued certificates indicating compliance. These include ongoing vessel drills, training, and periodic continuing education on developments in vessel technology, operations and management. These certificates are accepted by the United States Coast Guard as compliance with United States regulations, thus allowing the vessels to call at United States ports. Such standards are, in main, set forth in the treaties, conventions, international agreements and United States statutes discussed at pages 11 to 17 herein. These standards and the Coast Guard regulations prescribed under United States statutes present uniform, although stringent, standards and rules which are easily understood, thus facilitating ease of administration and compliance by the PMSA members.

In addition to comprising the majority of merchant shipping tonnage calling at West Coast ports, a significant number of PMSA ship operator members operate vessels on the East and Gulf Coasts of the United States. Approximately 8 of its 35 members own or operate tankers. PMSA submits this *amicus curiae* brief with written consent of all parties, submitted herewith, in accordance with Supreme Court Rule 37(3)(a).

III. ARGUMENT

A. Introduction

In its decision below, the United States Court of Appeals for the Ninth Circuit held that Washington State statutes and regulations relating to the operation of oil tankers are not preempted by federal law under the Supremacy Clause of the United States Constitution and do not otherwise violate the Constitution. In so holding, the court decided an important

question of federal law in a way that conflicts with decisions of this Court, most notably, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

Prior to the passage of the Oil Pollution Act of 1990 ("OPA 90"), the federal, state and local governments shared control over some matters relating to pollution control as well as to liability and compensation for pollution in state waters. They also shared control over pilotage where knowledge of local waters is important. As shown below, however, the federal government has consistently asserted exclusive control over matters relating to vessel design, construction, alteration, repair, maintenance, operation, personnel qualification, equipping and manning (including the training, duties and watch keeping of personnel and marine casualty reporting).

Statutes enacted by Congress and treaties adopted by the United States after *Ray* have expanded the scope of mandatory federal regulation, thus broadening the field preempted under the principles of *Ray*. Nothing in OPA 90 repeals the existing Congressional directives that require the Secretary of Transportation ("Secretary") and Coast Guard to promulgate regulations with preemptive effect with respect to vessel design, construction, manning, personnel qualifications, on-board operations and navigation. Nor do the OPA 90 § 1018 preemption clauses purport to apply to these already preempted fields of regulation. The Washington regulations, if not invalidated, will lead other coastal states throughout the nation to adopt similar regulations and will result in extreme confusion, complexity and expense for shipowners in areas of concern where Congress has made clear that it intended to adopt one uniform set of rules to govern all vessels calling at any port in the United States. For all of these reasons, the Ninth Circuit holding should be reversed.

1. Overview of Ninth Circuit Holding

Following the *Exxon Valdez* oil spill in Alaskan waters in 1989, Congress passed OPA 90. The legislation resulted from a combination of several bills into one comprehensive act with

nine titles. Title I of the Act, which addresses liability and compensation for oil spills, contains two provisions that address federal preemption of state law. One provides that "[n]othing in this Act . . . shall . . . affect, or be construed or interpreted as preempting, the authority of any State . . . from imposing any additional liability or requirements with respect to . . . the discharge of oil or other pollution by oil within such State . . ." *See,* § 1018(a) of OPA 90, codified at 33 U.S.C. § 2718(a). The other provides that "[n]othing in this Act . . . shall in any way affect, or be construed to affect, the authority of . . . any State . . . to impose additional liability or additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil." *See,* § 1018(c) of OPA 90, codified as 33 U.S.C. § 2718(c).

When Congress passed OPA 90, vessel design, construction, manning, personnel qualification, operation and navigation were already the subject of federal law relating to tanker safety and operation. Existing law included the Ports and Waterways Safety Act of 1972 ("PWSA"), codified as amended at 46 U.S.C. § 3701, *et seq.,* and the Port and Tanker Safety Act of 1978 ("PTSA"), codified at 33 U.S.C. § 1221, *et seq.* The PWSA concerned control of tanker traffic and tanker design, construction and operation. The PTSA concerned tanker management, personnel matters, casualty reporting and pilotage.

The State of Washington also enacted legislation relating to oil tankers and other vessels following the *Exxon Valdez* incident. The State established an Office of Marine Safety, which was empowered to promulgate regulations to protect state waters from oil pollution. The state regulations obligate owners and operators to: 1) Report events such as collisions, allisions and near misses of tankers; 2) employ specific watch and lookout practices and manning; 3) record positions every fifteen minutes, prepare comprehensive voyage plans and make frequent compass readings; 4) adhere to specified engineering and monitoring practices; 5) test and inspect engineering, navigation and propulsion systems before entering or

getting underway in state waters; 6) post written crew assignments and procedures relating to shipboard emergencies; 7) retain certain plotting records and the voyage plan in an event in state waters such as a collision, allision or near miss; 8) establish a comprehensive training program for personnel; 9) test and report regarding alcohol and drug use; 10) monitor personnel for fitness for duty; 11) limit hours personnel are allowed to work; 12) require proficiency of officers in English and other languages; 13) maintain training records for crew members of vessels; 14) implement management practices that demonstrate active monitoring of vessel operations and related matters; 15) equip vessels with global positioning, radar systems and emergency towing systems; and 16) provide notification of proposed entry of a vessel into state waters and of hazardous conditions. These regulations apply not only to vessels calling at Washington ports but also to vessels transiting Washington waters enroute to and from Canada or elsewhere.

The Washington State regulations can be generally described as concerning vessel operations, personnel qualifications and manning, including the duties and training of personnel. This is the same subject matter for which the Coast Guard has adopted a comprehensive regulatory scheme as directed by federal statutes. See, Appendix K to Intertanko's Petition for Writ of *Certiorari,* No. 98-1706, pages 349a to 353a. Thus, the Washington regulations present an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under existing federal law and regulations, when analyzed under *Ray.*

The Ninth Circuit, however, concluded that the OPA 90 "reflects the 'full purposes and objectives of Congress' . . ." better than preexisting legislation on the subject of oil pollution. *The International Association of Independent Tanker Owners (Intertanko) v. Locke,* 148 F.3d 1053, 1062 (9th Cir. 1998). The court held that the Washington regulations are not preempted by federal law because of the two preemption provisions in Title I of OPA 90. The court found that these provisions confirm the absence of Congressional intent in OPA 90 to preempt

the authority of any state to impose additional preventative requirements concerning vessels with respect to the pollution of the environment or the substantial threat of pollution by oil. *Id.* In doing so, the Court held that Coast Guard regulations did not preempt the Washington regulations. 148 F.3d at 1067-68.

2. Overview of Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978)

The Ninth Circuit's holding conflicts with the decision of this Court in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). There this Court considered whether federal law preempted then-existing Washington State regulations applicable to tankers. The Court considered the Washington regulations primarily against the PWSA. The PWSA contains two titles that overlap somewhat and are designed both to insure vessel safety and to protect navigable waters, water resources and shore areas from tanker cargo spillage. The focus of Title I is traffic control at local ports. *See, Ray*, 435 U.S. at 161, n. 9. The focus of Title II is tanker design and construction. *Id.*

Ray noted that Title II declares that the protection of life, property, and the marine environment from harm requires the promulgation of "comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation." 435 U.S. at 161. The Court also noted that Title II directs that "the Secretary *shall* establish such rules and regulations as necessary with respect to the design, construction, and operation of vessels as well as to a variety of related matters". *Id.* (quoting 46 U.S.C. § 391a(3) (emphasis added)).

The Court concluded that insofar as the design characteristics were at issue, and considering the statutes allowing the Secretary to approve foreign vessels with certificates issued under international standards as compliant with the Secretary's regulations, Congress had entrusted the Secretary of Transportation and the Coast Guard with the duty of determining which oil tankers are sufficiently safe to be allowed to transit the navigable waters of the United States. The Court also concluded that Congress intended "uniform national standards

that would foreclose the imposition of different or more stringent state requirements", 435 U.S. at 161-163, and that "state law in this area would frustrate the congressional desire of achieving uniform international standards". 435 U.S. at 167-68.

The Court reached a different conclusion as to Title I of the PWSA. The Court noted that "Title I . . . merely authorizes and does not require the Secretary to issue regulations to implement the provisions of the Title". 435 U.S. at 171. The Court observed that the Secretary had neither promulgated regulations relating to vessel traffic control issues nor determined that such regulations were unnecessary. As a result, the Court upheld the Washington State regulations that related to the subject of vessel traffic control in local waters. The Court further noted, however, that the Secretary may indeed issue regulations that would preempt the authority of the states even in the area of traffic control, but until that occurs, state regulations need not give way under the Supremacy Clause. 435 U.S. at 172.

The import of the decision in *Ray* is that, to determine whether a state law is preempted by federal law, a federal court must examine each provision of the state regulation as well as the applicable federal law to determine whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress or conflicts with a valid federal statute.

B. The Ninth Circuit Erred In Concluding That The Washington Regulations Are Not Subject to Field Preemption Under Ray

The Ninth Circuit's conclusion that "[b]ecause the Washington State regulations did not qualify as design and construction requirements, they are not automatically subject to field preemption under *Ray*", 148 F.3d at 1066, is inconsistent with the *Ray* analysis. *Ray* found that 46 U.S.C. § 391a(3) mandated that the Secretary "shall establish" such rules and regulations as may be necessary with respect to the design, construction and operation of the covered vessels, including the inspection of vessels and issuance of certificates of inspection evidencing

compliance with the Secretary's safety regulations. 46 U.S.C. § 391a(5). In lieu of inspection, the Secretary is to accept foreign vessels' valid certificates of inspection "recognized under law or treaty by the United States". The Court also noted that § 391a(6) directed the Secretary to inspect tank vessels for compliance with regulations which the Secretary is required to issue for the protection of the marine environment. "Compliance . . . and the consequent privilege of having on board the relevant cargo are evidenced by certificates of compliance issued by the Secretary or by appropriate endorsements on the vessels' certificates of inspection. . . . In lieu of a certificate of compliance . . . the Secretary may accept a foreign vessel's valid certificate evidencing compliance with rules and regulations issued under treaty, convention, or agreement providing for reciprocity of recognition of certificates or similar documents. § 391a(7)(D)." 435 U.S. at 161-163. Given this statutory pattern and directive, the *Ray* Court concluded that:

> Congress expressed a preference for international action and expressly anticipated that foreign vessels would or could be considered sufficiently safe for certification by the Secretary if they satisfied the requirements arrived at by treaty or convention; it is therefore clear that Title II leaves no room for the States to impose different or stricter design requirements. . . .

435 U.S. at 167-68.

In contrast, in addressing Title I, PWSA, *Ray* found no field preemption because "Title I, however, merely authorizes and does not require the Secretary to issue regulations to implement the provisions of the Title;. . . . 435 U.S. at 171. Thus, *Ray* found that the Congressional directive—that the Secretary *shall prescribe regulations* under Title II, coupled with the grant to the Secretary of the power to accept qualifying certificates from foreign vessels as satisfying such regulations—preempted the State's power to issue regulations on the same subject matter because the Washington regulations obstructed the full purposes and objectives of Congress.

Since *Ray*, Congress has expanded the purview of federal statutes and regulations concerning vessels. The contents of the pertinent section of Title II, § 391a have been expanded and re-codified at 46 U.S.C. § 3703. Pub.L.No. 98-89, 97 Stat. 522 (1983). Section 3703 provides that:

> (a) The Secretary *shall* prescribe regulations for the design, construction, alteration, repair, maintenance, operation, *equipping, personnel qualification, and manning* of vessels to which this chapter applies, that may be necessary for increased protection against hazards to life and property for navigation of vessel safety and for enhanced protection of the marine environment . . . [which] *shall* include requirements about— . . . (4) *the manning of vessels and the duties, qualifications and training of the officers and crew.* (Emphasis added.)[4]

The Secretary may still approve a foreign vessel to operate in United States waters and transfer oil or hazardous material at United States ports after the vessel is examined and found in compliance with United States law. 46 U.S.C. § 3711. The Secretary may still accept a valid certificate issued by a foreign country under treaty, convention or other international agreement as a basis for issuing a Certificate of Compliance to that vessel. *Id.*

The Secretary is also still required to provide for the inspection of vessels for compliance with applicable marine safety laws and regulations (among other things), and to require that a vessel display a valid certificate of inspection (46 U.S.C. §§ 3301, 3305, 3306, 3311), with discretionary reciprocity for a foreign vessels' certificate of inspection issued by a country with similar inspection laws and standards as the United States and that provides the same reciprocity privileges to United States vessels. A foreign country is considered to have similar inspection laws and standards when it is a party to

[4] In prescribing regulations under subsection 3703(a), "the Secretary shall establish procedures for consulting with and receiving and considering the views of . . . officials of State and local governments. . . ." 46 U.S.C. § 3703(c).

an International Convention for Safety of Life at Sea to which the United States is a party. 46 U.S.C. § 3303.

Thus, by the 1983 amendments to the PWSA, Congress expanded the field of mandatory subjects of regulation to add personnel qualification and manning of vessels including the duties and training of officers and crews to the subjects of vessel design, construction, alteration, repair, maintenance and operation. In doing so, and while leaving in place the foreign vessels provisions discussed in *Ray*, Congress expanded the field of preemption accordingly.

When other statutes enacted since *Ray* are considered, the expanded field of preemption is even more focused under the *Ray* analysis. Since *Ray*,[5] Congress has required, *inter alia*, the Secretary of Transportation to: evaluate manning, training, qualification and watch keeping standards of foreign nations and ban from United States waters the vessels of countries with standards below those of the United States[6]; prescribe regula-

[5] More generally, the Washington Statutes also interfere with the Secretary's mandatory administration of the general superintendence over the merchant marine of the United States and its personnel, 46 U.S.C. § 2103, which includes, for example, certificating vessels of the United States carrying oil or bulk hazardous material as cargo, as a condition to operating, 46 U.S.C. § 3710; licensing and testing (including drug testing) of masters, mates, engineers, operators, and radio officers, 46 U.S.C. §§ 1701, 7701-7705, and merchant mariners, 46 U.S.C. §§ 7302, 7315, 7701-7705; certificating or endorsing tankermen, 46 U.S.C. § 3717; determining the complement of licensed individuals and crews considered to be necessary for the safe operation of a vessel, 46 U.S.C. §§ 8101, 8301, 8304; watches on vessels, 46 U.S.C. § 8104; and the manning and language capability of the crew of a vessel, 46 U.S.C. §§ 8701(b), 8702(b). The Secretary hasissued extensive regulations under these statutes.

[6] The Secretary shall periodically evaluate the manning, training, qualification and watch keeping standards of a foreign country that issues documentation for any vessel subject to 46 U.S.C. §§ 3701-3719, to determine if that country's standard for licensing and certification of seamen are at least equivalent to United States law or international standards acceptable by the United States, 46 U.S.C. § 9101(a). The legislative history notes that such standards "may be considered to include the Convention on Standards for

tions for reporting of marine casualties[7] and a uniform state marine casualty reporting system for vessels[8]; establish and implement a safety management system to ensure accident reporting procedures consistent with international standards[9]; enforce minimum professional qualifications for vessel masters and officers consistent with treaty[10]; bar from U.S. waters vessels which, under U.S. or foreign law or treaty, may threaten the marine environment or safety[11]; approve regulated vessel equipment and material, with discretion to rely on approval by

the Training, Certification and Watch Keeping for Seafarers" (H.R. Conf. Rep. No. 643, 101st Cong., 2nd Sess., at 132 (1990). The vessels of any country failing such evaluation are prohibited from entering the United States, 46 U.S.C. § 9101(a)(3). Foreign tank vessels must have the Secretary's prescribed number of certified tankermen, where the crewmember in charge must understand English in order to transfer oil or hazardous material in United States ports. 46 U.S.C. § 9101(b).

[7] The Secretary shall prescribe regulations for "marine casualties to be reported and the manner of reporting." 46 U.S.C. §§ 6101, 6101(b).

[8] 46 U.S.C. § 6102; 46 U.S.C. § 6103 prescribes penalties for vessel failure to company with 46 U.S.C. §§ 6101 and 6102.

[9] The Secretary shall establish an uniform state marine casualty reporting system for vessels and implement a safety management system for vessels to insure safe and accident reporting procedures consistent with the International Safety Management Code, 46 U.S.C. §§ 3203, 3204, with provisions to deny clearance under 46 U.S.C. § 91 of any non-complying vessel. 46 U.S.C. § 3205.

[10] The Secretary must enforce the minimum requirement of professional capacity for masters and officers on board merchant vessels operating on the high seas, under the Officers Competency Certificates Convention, 1936, with authority to detain both a United States vessel and a foreign vessel for non-compliance until cured. 46 U.S.C. § 8304.

[11] The Secretary shall bar any vessel that has a history of accidents, pollution or repairs from the United States waters which, in the Secretary's determination may be unsafe or threaten the marine environment, fails to comply with United States or foreign law or treaty, or is manned by an officer licensed by a state whose standards are below the United Statesor international standards. 33 U.S.C. § 1228.

foreign governments per treaty standards[12]; and, transmit regulations promulgated under 33 U.S.C. §§ 1221, et seq., to appropriate foreign bodies for consideration as international standards.[13]

International agreements and treaties to which the United States is a party—which are the "law of the land"[14]—illustrate this point even further. These agreements include the following: the U.S.-Canada VTS agreement, 32 U.S.T. 377[15]; the International Convention for the Safety of Life at Sea, 1974 and

[12] The Secretary must approve regulated equipment and material before used on any vessel and may treat an approval of equipment or materials by a foreign government as approval by the Secretary if the design standards and testing procedures used by that government meet the requirements of International Convention for the Safety of Life at Sea, 1974 if such approval will secure the safety of individuals and property on board vessels subject to inspection and if the foreign government grants reciprocity. 46 U.S.C. § 3306(b)(1)(2)(A),(B),(C).

[13] The Secretary shall transmit to appropriate international bodies or forums, any regulations issued under 33 U.S.C. § 1221, et seq. for consideration as international standards. 33 U.S.C. § 1230.

[14] *See, e.g., United States v. Pink*, 315 U.S. 203, 230-31, 62 S.Ct. 554, 565-66, 86 L.Ed. 796 (1942) (treaties and international agreements are "law of the land" under Supremacy Clause); *In re Damodar Bulk Carriers, Ltd.*, 903 F.2d 675, 687 (9th Cir. 1990) (recognizing SOLAS as "law of the land").

[15] This agreement was entered into with Canada under 33 U.S.C. § 1230, which "authorize[s] and encourage[s]" the President to arrive at agreements with neighboring nations to establish vessel standards and vessel traffic service and authorized the Secretary to waive the application of any United States law or regulation concerning the design, construction, operation, equipment, personnel qualifications and manning standards for vessels operating in waters of the United States if the vessel is not enroute to or from a United States port or place and if the neighboring nation accords equivalent waivers for vessels enroute to or from a United States port. 33 U.S.C. § 1230(c)(2).

its Protocol of 1978 ("SOLAS"), 32 U.S.T. 47[16]; the International Convention for the Prevention of Pollution from Ships, 1973, and its 1978 Protocol ("MARPOL"); and the International Convention on Standards of Training, Certification and Watch Keeping for Seafarers, 1978, and the 1995 Amendments thereto ("STCW")[17].

[16] The purpose of SOLAS is to establish uniform international standards for the safety of life and property at sea and the protection of the marine environment. SOLAS governs, among other things, safety of navigation, carriage of dangerous goods, management for the safe operation of ships and special matters to enhance maritime safety. (Chs. IV, V, VII, IX, and XI.) SOLAS requires the Government of the State "whose flag the ship is entitled to fly" to conduct a system of inspections and surveys, and the issuance of certificates carried on board the vessel showing that the vessel complies with SOLAS (SOLAS Annex, Ch. I, Rg. 2, and Regs. 6-18).

The extent to which the authorities of one Government can control the ship of another Government under SOLAS is specified in Regulation 19(a) of Chapter I of the Annex:

> Every ship when in a port of another Contracting Government is subject to control by officers duly authorized by such Government insofar as this control is directed towards verifying that the . . . [SOLAS certificates] . . . are valid.

The SOLAS certificate of a foreign flag vessel "shall be accepted" unless there are "clear grounds" for "believing that the condition of the ship or its equipment does not correspond substantially with the particulars of any of the [SOLAS] certificates", or the SOLAS certificate has expired or is no longer valid. Under such circumstances, the vessel may be detained and the next port of call and the flag State must be notified. Regulation 19(c), (d), and (e).

The Secretary passed Federal Regulations codified at Volumes 33 and 46 of the Code of Federal Regulations pursuant to 46 U.S.C. § 2103, to authorize the United States Coast Guard to enforce SOLAS.

[17] The purpose of STCW, like SOLAS, is to establish uniform international standards for the safety of life and property at sea and the protection of the marine environment. The STCW governs vessel operations, personnel, and training matters, and also provides for the issuance of certificates by the flag State with respect to the standards for fitness, training, and qualifications of vessel personnel.

As in SOLAS, the STCW provides for authorities of one Government to control the ship of another Government: Ships, except those excluded . . .

SOLAS and the STWC are of significant import in that they provide the rules and regulations under which foreign vessels certificates are issued. These are the same certificates that the Secretary may accept as a basis for issuing a certificate of compliance to allow a vessel to enter United States waters and transfer oil or other hazardous materials at a United States port and also in lieu of the inspection of the vessel for marine safety and environmental compliance under United States regulations.

The Congressional mandate to the Secretary to regulate vessel operations, personnel qualifications and manning of vessels, including the duties, qualifications and training of the officers and crew, coupled with the statutes concerning foreign vessels and treaties, indicates "a class of regulations which Congress alone can provide" due to the need for uniformity, *Kelly v. Washington*, 302 U.S. 1, 14-15, 58 S.Ct. 87, 82 L.Ed. 3, (1937). This class of regulations could "not properly be left to the diverse action of the States. The State of Washington might prescribe standards and rules of one sort, Oregon another, California another and so on. . . ." *Id.*

Under *Ray's* rationale, the federal statutory pattern set forth above on subject matter embraced by the Washington regulations indicates that Congress expressed preference for international action on those subjects. Congress anticipated that foreign vessels and their personnel could be sufficiently safe to call at United States ports and waters if they satisfied the requirements established by treaty or convention. In doing so, Congress left no room for States to impose different or stricter requirements. Simply put, "[a] state law in this area . . .

[from the application of STCW]. . . . are subject, while in the ports of a Party to control by officers duly authorized by the Party to verify that all seafarers serving on board or required to be certificated by the Convention are so certificated or hold an appropriate dispensation. Such Certificate shall be accepted unless there are clear grounds for believing that the Certificate has been fraudulently obtained or that the holder of a Certificate is not the person to whom that Certificate was originallyissued. (STCW Conference, Article X)

would frustrate the congressional desire of achieving uniform, international standards and thus is at odds with "the object sought to be obtained [by Congress] . . . and the character of obligations imposed [by Congress]. . . ." *Ray*, 435 U.S. at 167-68.

C. OPA 90 Does Not Repeal The Authority Of The Secretary And Coast Guard To Promulgate Regulations That Have Preemptive Effect

In enacting OPA 90, Congress did not explicitly repeal the authority that had been conferred upon the Secretary of Transportation and the Coast Guard under the PWSA and other federal statutes. That is significant for, having once given a federal agency the authority to promulgate regulations in a field, Congress must abide by that delegation of authority until it is altered or revoked. *Cf. Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 955, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). The House Conference Committee confirmed in its analysis of the pending legislation that was to become OPA 90 that § 1018 "does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company*, 435 U.S. 151 (1978)." *See*, H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess., at 121-22 (1990). Accordingly, nothing in OPA 90 can be construed to demonstrate that Congress intended to repeal Coast Guard regulations that were in effect at the time Congress passed OPA 90, or to prevent the Coast Guard from adopting regulations post-OPA that preempt state law.

In empowering a federal agency to act, Congress need not specifically authorize the agency to pass regulations that preempt state law for that agency to have the power to do so. *See, City of New York v. Federal Communications Commission*, 486 U.S. 57, 64, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988). The Coast Guard regulations that have been promulgated pursuant to the mandatory Congressional direction of the PWSA and later enactments were intended to preempt state regulation relating to

the on board operation of vessels. See Appendix H to Intertanko's Petition for a Writ of *Certiorari*, No. 98-1706, pages 269a-289a and Appendix K, pages 349a-353a.

D. The OPA 90 § 1018 Preemption Clauses Apply Only To The Liability And Compensation Provisions Of Title I

The requirements of § 1018(a) and (c) of OPA 90 require no different conclusion. As explained in the dissent of Judge Graber from the Ninth Circuit denial of petition for rehearing and suggestion for rehearing *en banc*, 159 F.3d 1220 (9th Cir. 1998), § 1018(a) and (c) are limited to Title I of OPA 90 and its liability and compensation provisions. The Section 1018 preemption clauses can be read broadly to include prevention measures in Title IV or read narrowly to apply only to the liability and compensation provisions of Title I. Standing alone, the wording of the provisions is ambiguous. Judge Graber noted that contextual clues in OPA 90 suggest that the narrow reading was actually intended. That is because § 1018 is placed in Title I, which addresses only liability and compensation for oil spills that actually occur, whereas Title IV, Title V, and Title VIII have their own preemption clauses. If the clauses in Title I were comprehensive, the preemption clauses of the other Titles would be superfluous. Courts generally avoid construing statutes in a way that would make substantial provisions superfluous. *See Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996).

Having found the language of the statute to be ambiguous, Judge Graber analyzed the legislative history of OPA 90 at 159 F.3d at 1221-1223. She concluded that the history suggests that Congress intended for the preemption clauses of § 1018 to apply only to Title I and its liability and compensation provisions and not to apply to OPA 90's oil spill prevention

provisions (Title IV).[18] 159 F.3d at 1221-1223. Judge Graber's dissentis well-reasonedand in keeping with the statutory pattern strongly supporting preemption of the Washington regulations. Judge Graber relied on *National Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atlantic Corp.*, 924 F.Supp. 1436, 1448 (E.D. Va. 1996), aff'd, 122 F.3d 1062 (4th Cir. 1997) (Table) cert. denied, 140 L.Ed. 2nd 467, 118 S.Ct. 1301 (1998), inter alia, in her analysis. The plaintiff in *NSCSA* argued that OPA's "saving clause" preserved its right to seek contribution from a co-defendant under both OPA and state law. In rejecting that argument, the district court, after analyzing the legislative history, held, "[t]he purpose behind the savings clause is to allow the states to impose liability upon oil polluters above the liability imposed through OPA. Congress wanted to give the states the power to force polluters to clean up oil spills completely and to compensate the victim of oil spills, even if their liability for these remediation expenses is limited under OPA".[19] As advanced by Judge Graber and *NSCSA*, the preemption clauses of § 1018 of OPA 90 should be narrowly read to apply only to the compensation and liability provisions of Title I, a result consistent with the federal statutory pattern and directives requiring preemption of the Washington regulations.

E. The Washington State Regulations Invite Other States To Issue Regulations With Attendant Complexities, Confusion And Potential Increased Risk To Safety And The Marine Environment

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[18] Judge Graber's summary of the history of the pending Senate and House bills and the blending of those bills into the final OPA 90 legislation by the Congress Conference Committee points out that the committee's "deletion of the only preemption clause that applied specifically to oil spill prevention and its reliance instead on two provisions that never applied to prevention provisions, together suggest that Congress did not intend its final version of Section 1018 to apply to OPA 90's oil spill prevention provisions (Title IV)." 159 F.3d at 1225.

[19] Judge Graber's disagreement with the Ninth Circuit's holding on the preemptive effect of Coast Guard regulations as inconsistent with Ninth Circuit and Supreme Court precedent is also well-stated.

As shown above, the Ninth Circuit's decision in this case is clearly inconsistent with the conclusion of the *Ray* Court that the federal judgment of whether a vessel is safe to navigate in waters of the United States prevails over a contrary state judgment. *See,* 435 U.S. at 165. The issue is one of extreme importance to the members represented by PMSA. Under the Ninth Circuit's ruling, other coastal states of the circuit, notably California, Oregon, Hawaii and Alaska, are free to adopt their own, different requirements relating to any aspect of OPA 90. Moreover, in addition to regulating tanker vessels, the State of Washington is now empowered to enforce its regulations that relate to the screening of dry cargo and passenger vessels that transit its waters to determine whether they present a substantial risk of harm to public health and safety of the environment. *See,* Wash. Rev. Code § 88.46.050. Other states could well follow suit.

Vessel operators otherwise complying with Coast Guard standards and International Treaties and Agreements will incur extraordinary additional expense and time to comply with the more stringent Washington standards—if compliance is even possible. Compliance would require vessel operators to, among other things, transport to their vessels additional multi-lingual officers and crews trained to Washington standards for transit through Washington waters, or to maintain such vessel staffing at all times; to constantly prepare, maintain and submit the Washington-required records—different in format and content from the Coast Guard requirements, thus imposing duplicate record keeping and reporting burdens on operators—for vessel worldwide operations; and to perform worldwide random alcohol and drug testing of all personnel on all vessels operated by concerned carriers and to report the results to Washington State. These rules are far more burdensome than, and conflict with, Coast Guard and international standards.

The problem would certainly be compounded should other states—such as Oregon, California, Hawaii, and Alaska—enact their own detailed regulations on the same subject matter.

Other port states of the United States and their political subdivisions could well follow suit. Operators of vessels transiting the waters of these states on the same voyage would be faced with an overwhelming managerial burden, in addition to heavy expense, if forced to keep track of, reconcile and comply with multiple and conflicting state and federal/international standards for crew training, multilingual capability, watch keeping, recording and reporting, navigation, engineering and other vessel operations. This potential burden is highlighted when one considers that there are currently about 10,000 vessel calls a year, collectively, at the major West Coast ports, 70% to 80% of which are foreign flag vessels. This means that about 27 vessels arrive and 27 vessels depart those ports each day, 20% to 30% of which are transiting to or from other ports in the Ninth Circuit.

Moreover, state regulation of this subject matter will frustrate the expertise of the Secretary of Transportation and the Coast Guard to prescribe national and uniform regulations for the concerned subject matter as directed by 46 U.S.C. § 3703(a). To impair the Secretary's ability to act is particularly unnecessary in this instance because Congress has directed the Secretary to consult with and consider the views of interested state governments and other parties described in 46 U.S.C. § 3703(c) and 33 U.S.C. § 1231. Thus, the interests of the various states and their political subdivisions will not be ignored and, indeed, can be incorporated into uniform national standards consistent with international standards.

State regulation of the same subject matter clearly interferes with the Congressional objective of uniform federal and international standards upon which the international maritime community can rely. Moreover, the Ninth Circuit's ruling leaves open the door for a conflicting multi-state and federal/international regulatory quagmire affecting not only tank vessels, but dry cargo and passenger vessels as well, all of which are within the ambit of Washington regulation.

The PMSA members, who are particularly at risk because of their operations in the waters of the states comprising the

Ninth Circuit, submit that uniform national and international maritime standards are necessary for safe and efficient vessel operations for the international maritime community, a public policy well entrenched in federal statutes and regulations and this Court's precedent.

IV. CONCLUSION

The Pacific Merchant Shipping Association respectfully urges the Court to grant the relief requested by petitioners to establish a national, uniform rule of maritime law that is consistent with federal statutes, regulations, international standards and the precedent of this Court.

Respectfully submitted,

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ADDENDUM I

VESSELS	PORTS OF CALL/DATES (1999) CALIFORNIA L.A./ L.B.	CALIFORNIA S.F./ OAKLAND	OREGON PORTLAND	WASHINGTON SEATTLE/ TACOMA	CANADA VANCOUVER
1. APL China	Oct. 12			Oct. 8	
2. APL Japan	Oct. 26			Oct. 22	
3. APL Korea	Nov. 2			Oct. 29	
4. Argentina Star	Nov. 6	Nov. 4		Nov. 9	Nov. 10
5. Astoria Bridge			Oct. 17	Oct. 14	Oct. 16
6. Bay Bridge			Oct. 31	Oct. 28	Oct. 30
7. Beauty River	Oct. 11				Oct. 7
8. Bremen Express		Nov. 2		Oct. 29	Oct. 31
9. Cap Vilano	Oct. 23	Oct. 21		Oct. 27	Oct. 28
10. Cap York	Oct. 9	Oct. 7		Oct. 12	Oct. 13
11. Cape Charles		Oct. 26		Oct. 22	Oct. 24
12. Chuan He	Oct. 30			Nov. 4	Nov. 5
13. Cielo Di America	Oct. 6	Oct. 12	Oct. 10	Oct. 13	Oct. 9
14. Cielo Di Italia	Nov. 2	Nov. 9	Nov. 7	Nov. 10	Nov. 6
15. Cielo Di San Francisco	Oct. 17	Oct. 24	Oct. 22	Oct. 25	Oct. 21
16. Columbus Florida	Oct. 30	Oct. 28		Nov. 2	Nov. 3
17. Columbus Pacific	Oct. 26	Oct. 28		Oct. 30	Oct. 31
18. Columbus Queensland	Oct. 16	Oct. 14		Oct. 19	Oct. 20
19. Cosmic Challenger	Oct. 11			Oct. 5	
20. Dagmar Maersk	Oct. 24			Oct. 27	
21. Dainty River	Nov. 1				Oct. 28

VESSELS	PORTS OF CALL/DATES (1999) CALIFORNIA L.A./ L.B.	CALIFORNIA S.F./ OAKLAND	OREGON PORTLAND	WASHINGTON SEATTLE/ TACOMA	CANADA VANCOUVER
22. Direct Condor	Oct. 8	Oct. 6		Oct. 4	
23. Direct Eagle	Oct. 15	Oct. 13		Oct. 11	
24. Direct Falcon	Oct. 12	Oct. 10		Nov. 8	
25. Direct Jabiru	Nov. 1	Oct. 27		Oct. 25	
26. Direct Kea	Oct. 19	Oct. 17		Nov. 15	
27. Direct Kiwi	Nov. 5	Nov. 3		Nov. 1	
28. Direct Kookaburra	Oct. 22	Oct. 20		Oct. 18	
29. Ever Gaining	Nov. 2		Nov. 6		
30. Ever Gifted	Oct. 5		Oct. 9		
31. Ever Glowing	Oct. 12		Oct. 16		
32. Ever Grade	Oct. 26		Oct. 30		
33. Ever Laurel	Oct. 10			Oct. 15	Oct. 14
34. Ever Linking	Oct. 19		Oct. 23		
35. Ever Loading	Oct. 17			Oct. 22	Oct. 21
36. Fanal Merchant	Oct. 26	Nov. 4	Nov. 2	Oct. 30	
37. Fesco Enterprise	Oct. 21			Oct. 26	
38. Fesco Express	Oct. 2			Oct. 7	
39. Golden Gate Bridge			Oct. 2	Sep. 30	Oct. 3
40. Hanjin Hongkong			Oct. 18	Oct. 14	Oct. 19
41. Hanjin Kaohsiung			Oct. 11	Oct. 7	Oct. 9
42. Harbour Bridge			Oct. 10	Oct. 7	Oct. 9
43. Honor River	Oct. 25				Oct. 21
44. Humbuldt Current	Nov. 10			Nov. 2	Oct. 27

VESSELS	PORTS OF CALL/DATES (1999) CALIFORNIA L.A./ L.B.	CALIFORNIA S.F./ OAKLAND	OREGON PORTLAND	WASHINGTON SEATTLE/ TACOMA	CANADA VANCOUVER
45. Hyundai Challenger			Oct. 9	Oct. 5	Oct. 7
46. Hyundai Commander			Nov. 6	Nov. 2	Nov. 4
47. Hyundai Discovery	Oct. 7	Oct. 11		Nov. 13	
48. Hyundai Explorer			Oct. 23	Oct 19	Oct. 21
49. Hyundai Fortune	Oct. 28	Nov. 1		Nov. 3	
50. Hyundai Freedom	Oct. 21	Oct. 25		Oct. 27	
51. Hyundai Frontier			Oct. 30	Oct. 26	Oct. 28
52. Hyundai Independence	Oct. 14	Oct. 18		Oct. 20	
53. Hyundai Innovator			Oct. 16	Oct. 12	Oct. 14
54. Hyundai Liberty	Sep. 30	Oct. 4		Oct. 6	
55. Jin He	Oct. 16			Oct. 21	Oct. 22
57. Kapitan Byankin	Nov. 16	Nov. 25		Nov. 20	
57. Kapitan Maslov	Oct. 13	Oct. 21	Oct. 19	Oct. 16	
58. Karen Maersk	Nov. 12			Nov. 18	
59. Kauai			Oct. 12	Oct. 9	
60. Lu He	Oct. 9			Oct. 14	Oct. 15
61. Mahi Mahi	Oct. 4	Oct. 7	Oct. 14	Oct. 12	
62. Maple River	Oct. 4				Sep. 30
63. Mare Caspium	Oct. 12	Oct. 15		Oct. 19	Oct. 18
64. Maui			Oct. 5	Oct. 2	
65. Micronesian Heritage	Oct. 28	Oct. 27	Nov. 3		
66. Micronesian Nations	Oct. 14	Oct. 12	Oct. 9		
67. Ming River	Oct. 4				Sep. 30

VESSELS	PORTS OF CALL/DATES (1999) CALIFORNIA L.A./ L.B.	CALIFORNIA S.F./ OAKLAND	OREGON PORTLAND	WASHINGTON SEATTLE/ TACOMA	CANADA VANCOUVER
68. Moldova	Nov. 2	Nov. 11	Nov. 9	Nov. 6	
69. NYK Castor	Oct. 1	Oct. 1		Oct. 5	Oct. 4
70. NYK Springtide	Oct. 5	Oct. 8		Oct. 12	Oct. 11
71. OOCL Fair		Oct. 15		Oct. 18	
72. OOCL Faith		Oct. 4		Oct. 1	
73. P&O Nedlloyd Barcelona		Oct. 19		Oct. 15	Oct. 17
74. P&O Nedlloyd Genoa	Oct. 10			Oct. 14	
75. P&O Nedlloyd Jakarta	Oct. 17			Oct. 21	
76. P&O Nedlloyd Sydney	Oct. 24			Oct. 28	
77. P&O Nedlloyd Texas		Oct. 5		Oct. 1	Oct. 3
78. Pacprince	Oct. 24				Oct. 30
79. Pacprincess	Nov. 17		Nov. 25		Nov. 28
80. President Grant	Oct. 18	Oct. 21	Oct. 28	Oct. 26	
81. President Jackson	Oct. 5			Oct. 1	
82. President Wilson	Oct. 11	Oct. 14	Oct. 21	Oct. 19	
83. Pretty River	Oct. 18				Oct. 14
84. Reina Rosa	Nov. 1			Nov. 7	Nov. 9
85. River Crystal	Nov. 8				Nov. 4
86. Rossel Current	Dec. 6				Nov. 27
87. Sea-Land Navigator		Oct. 12		Oct. 8	
88. Sofie Maersk	Nov. 5			Nov. 11	
89. Soroe Maersk	Oct. 15			Oct. 21	
90. Sovereign Maersk	Oct. 29			Nov. 4	

VESSELS	PORTS OF CALL/DATES (1999) CALIFORNIA L.A./ L.B.	CALIFORNIA S.F./ OAKLAND	OREGON PORTLAND	WASHINGTON SEATTLE/ TACOMA	CANADA VANCOUVER
91. Stadt Dusseldorf	Oct. 2	Sep. 30		Sep. 6	Sep. 7
92. Star Davanger	Oct. 22	Oct. 26			Nov. 5
	Nov. 14	Nov. 12			
93. Star Evanger	Oct. 7	Oct. 9	Oct. 13		Oct. 21
	Oct. 30	Oct. 29			
94. Star Harmonia	Oct. 11	Oct. 13			Oct. 23
95. Star Leikanger	Nov. 14	Nov. 17	Nov. 22		
96. Sun Dance	Oct. 13			Nov. 19	Nov. 20
97. Svendborg Maersk	Oct. 8			Oct. 14	
98. TMM Bogota	Oct. 6	Oct. 8		Oct. 10	Oct. 12
99. Tokio Express		Oct. 11		Oct. 8	
100. Tower Bridge			Oct. 25	Oct. 22	Oct. 23
101. Wan He	Oct. 2			Oct. 7	Oct. 8
102. Yue He	Oct. 23			Oct. 28	Oct. 29
103. Yuriy Ostrovskiy	Nov. 9	Nov. 18	Nov. 15	Nov. 13	
104. Zim Beijing	Oct. 22	Oct. 24		Oct. 26	Oct. 17
105. Zim China	Oct. 26	Oct. 28	Nov. 1	Nov. 2	Nov. 3
106. Zim Europa	Oct. 12	Oct. 14	Oct. 18	Oct. 19	Oct. 20
107. Zim Pacific	Oct. 5	Oct. 7	Oct. 11	Oct. 12	Oct. 13
108. Zim Seoul	Oct. 29	Oct. 31		Nov. 2	Oct. 25
109. Zim Seattle	Oct. 15	Oct. 17		Oct. 19	Oct. 11
110. Zim Shekou	Oct. 8	Oct. 10		Oct. 12	Oct. 4
111. Zim USA	Oct. 21	Oct. 26	Oct. 28	Oct. 27	Oct. 25

(19) (19)

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Nos. 98-1701; 98-1706

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Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF *AMICUS CURIAE*

INTERESTS SUPPORTED

This *amicus curiae* brief is submitted with the consent of all counsel of record in support of the position of the United States of America and of Intertanko. The brief was authored in whole by the *amicus curiae*, and no monetary contribution to the preparation or submission of this brief was made by anyone other than the *amicus*.

INTERESTS OF THE AMICUS

The Steamship Association of Southern California represents approximately ninety percent of the maritime industry in Southern California, which is where the two largest seaports in the United States are located. The Association is concerned that the position of the State of Washington herein will lead to increasingly incompatible and disorganized interference by each of the littoral states of the United States in foreign trade by sea. An excess of individual and incompatible regulation will adversely affect the ability of companies and consumers in the United States to rely upon low cost and reliable import and export of goods, as it will discourage trading by vessels.

MARITIME TRADE IS INHERENTLY INTERNATIONAL AND INTERSTATE

The "littoral" states, being states with an ocean coast line, are generally considered to comprise Hawaii, Alaska, Washington, Oregon, California, Texas, Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, Virginia, Maryland, Delaware, New Jersey,

New York, Connecticut, Rhode Island, Massachusetts, New Hampshire and Maine. This list does not include states which lie on the Great Lakes or the great rivers, which also engage in international trade by sea, and which include Pennsylvania, Ohio, Michigan, Wisconsin and Illinois, and to a lesser extent Kentucky, Missouri, Tennessee and Arkansas. Altogether, if the Ninth Circuit opinion stands, a majority of the several states have an interest in creating their own local and distinct pollution and operational laws applicable to ocean vessels. This is a recipe for anarchy.

The international transportation of goods by sea is characterized by relatively low value of cargoes, bulky cargoes, or dense cargoes, since all of these are unsuited for carriage by airplane. Consequently, it is commercially desirable for each discrete parcel of cargo to be discharged at a port closest to its ultimate destination, to minimize the inland costs of delivery. This important factor means that vessels are increasingly required to call at numerous ports within the United States on each voyage. Port calls in multiple states are now the rule rather than the exception.

In an attempt to assist this Court with an understanding of the scope of the international trade as it affects California and its relations with the other states and foreign nations, the Association has examined all vessel records for the past five years. These are voluminous indeed. A sample, for the months of August 1995 to August 1999 has been selected (because August is a standard month without any unusual characteristics).

During a typical August, large commercial vessels call at Los Angeles and Long Beach from the following California ports -- Benicia, El Segundo, Estero Bay, Eureka, Martinez, Oakland, Oleum, Port Hueneme, Redwood City, Richmond, San Diego and San Francisco. The combined port of Los

Angeles/Long Beach claims to be the second busiest commercial port in the world. All such statistics are inherently flexible -- but it cannot be doubted that California's sea trade is a major component in the world economy.

Most of the vessels that call at the California ports listed above will also call at other U.S. ports in other states. The August records show that these vessels had just arrived from, or were going to, Anacortes, Anchorage, Baltimore, Baton Rouge, Brownsville, Camden, Cherry Point, Coos Bay, Corpus Christi, Galveston, Honolulu, Houston, Jacksonville, Kenai, Kitimat, Miami, New Orleans, Nikiski, Pascagoula, Port Angeles, Portland, Richmond, Savannah, Seattle, Tacoma, Texas City, Valdez or Vancouver, Washington. One or more ships was also trading directly as its next or last port to Pago Pago, St. Croix or San Juan, Puerto Rico. These records unequivocally demonstrate that interstate trade is an integral part of the voyage for most vessels that trade into or out of Southern California.

Because the records reviewed by the Association do not identify all ports on a vessel's voyage, it is impossible to reconstruct every aspect of the ocean trade into and out of California. However, in a typical August, a typical vessel that calls at California ports will also call at another port in another state of the United States, and will have come from or be bound to one of the following foreign ports - Acajutla, Amuay Bay, Antofagasta, Antwerp, Aruba, Auckland, Avon, Balboa, Balao, Banyuwangi, Brisbane, Busan, Cabo San Lucas, Callao, Caracas, Cartagena, Cedros Island, Chiba, Coleta Coloso, Colon, Corinto, Cristobal, Dakar, Dalian, Duncan Bay, Ensenada, Esmeraldes, Estodo, Frasier, Ghent, Gijan, Gladstone, Gold River, Greenock, Guayaquil, Guaymas, Hakata, Halifax, Hibikimada, Higashiharima, Hong Kong, Huasco, Inchon, Irago, Isonomaki, Kaohsuing,

Kashima, Kawasaki, Keelung, Kingston, Kinuura, Kobe, Kuantin, La Pallice, Las Ventana, Lazaro Cardenas, Majuro, Manila, Manta, Manzanillo, Marifu, Masan, Matsuura, Mazatlan, Miike, Mitukojima, Mitsushima, Montreal, Muroran, Nagasaki, Nagoya, Nigata, Nokhodka, Norito, Ofumato, Oita, Okinawa, Onahama, Ormoc, Osaka, Papeete, Penang, Puertos Armuellos, Bayomar, Bolivar, Caldera, Limon, Miranda, Quetzal, Rosarito Beach, Rotterdam, Sfax, Shanghai, Salina Cruz, San Juan de la Costa, San Marco, Santa Maria, Santos, San Luis, Sao Luis, Sao Paulo, "SEA", Shekou, Singapore, Soma, Suva, Sydney, Taichung, Talara, Tauranga, Tokyo, Tomakomai, Toyobashi, Ulsan, Valencia, Valparaiso, Vancouver, B.C., Vladivostok, Victoria, Yokohama, Yosu or Yunai.

This list demonstrates the diversity of ports -- but the industry can be analyzed further by examining the trades involved to show that international and interstate trade is the very essence of California's ocean experience.

One major group of vessels, the massive Generation III and IV container vessels, run regular routes from Japan, Korea or China to Los Angeles, Oakland, Portland, Vancouver, B.C., and Seattle, and then return. Another similar trade comes from Europe, with containers, and calls at East and Gulf Coast ports before passing through the Panama Canal, calling at West Coast ports, and sailing to the Far East. Two further trades in automobiles ply into West Coast ports, one from the Far East and the other from Europe, carrying many thousands of automobiles per voyage. Specialized fruit vessels bring bananas to the West Coast ports from Central America, while other, more generalized refrigerated vessels bring fruit and coffee from South America, and meat and Kiwi fruit from Australia and New Zealand. Another trade brings huge quantities of newsprint

down from Northern Canada to West Coast ports. These specialized trades have several features in common: they use specially designed and extremely valuable vessels, they call so often and so regularly that their crews have developed an expertise in navigation on American waterways that rivals the skills of the local pilots, and they invariably trade in numerous ports up and down the West Coast as part of a single schedule. Their specialized nature and dedicated trades mean that the price paid by consumers for newspapers, bananas, grapes, apples, coffee, Toyotas, Mazdas, Hyundais, Volkswagens, Land Rovers, Mercedes Benzes, computers, toys, calculators, lamb, wine, has only a minimal fraction of their cost attributable to transportation expenses.

Another group of vessels calls to pick up shiploads of single cargoes, and these vessels rarely call at more than one port to *load*: they load wood chips, timber, lumber, coal, petroleum coke, salt, sulphur. But they often arrive full with a discharge schedule that takes them to many ports in many states. These general purpose bulk vessels regularly call at six or seven Far East ports to load and four or five ports on the West Coast or a combination of West, Gulf and East Coasts to discharge their plywood panels, door skins, steel coils, I-beams, wire rod and galvanized pipes.

Other vessels call to load or discharge crude oil and distilled oils. Other very specialized "clean product tankers" regularly call up and down the coast at a multitude of ports discharging highly refined and very valuable cargos in small parcels. They frequently come from Texas and Louisiana refineries. One other group of vessels comes for a very limited purpose: these vessels call at California ports to "take on bunkers," which means replenishing fuel, diesel, or lubricating oils.

In the list of ports above, some ships identified their last port as "SEA." These ships had been directed to the U.S. West Coast "on spec" without a cargo. Their owner or operator then obtained a fixture and arrived: this business alone would be devastated if each U.S. states had particular, distinct and local req irements that differed from state to state.

Most vessels that call in California do so repeatedly, on a schedule, and trade to other states as an integral part of their international business. In this scheme of multiple, regular calls at ports on the West Coast and around the United States, it is essential that the shipowner, officers and crews be faced with a single set of safety and operating rules -- from the Coast Guard.

THE STATE REGULATIONS EXCEED THE POWERS THAT CONGRESS HAS DELEGATED

The issue before this Court is whether the provisions of "OPA 90" (33 U.S.C. § 2701 *et seq.*) that permit states to create "additional liability or additional requirements" have been preempted in respect of local regulation of tank vessels by the panoply of Coast Guard regulations. Within this issue is another: the proper relationship of the several states to the maritime power of the United States. This position was fully thought out by the Founding Fathers, and has been clearly stated in prior case law by this Court: **just as there are some rights of the States that Congress may not usurp, so there are national interests that Congress may not delegate to the states**. The regulation of maritime trade is one such protected area.

In a series of three seminal cases, *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S. Ct..

438, 64 L. Ed. 834 (1920), and *Washington v. W.C. Dawson Company*, 264 U.S. 219, 44 S. Ct. 302, 68 L. Ed. 640 (1924), this Court clearly indicated that Congress cannot delegate its inherent powers over maritime commerce to the states.

This line of cases has not been modified in its effect on the operation of vessels in state waters by the language of *Askew v. American Waterways Operators*, 411 U.S. 325, 344, 93 S. Ct. 1590, 36 L. Ed. 2d 280 (1973); indeed, *Askew* appears to preserve this analysis in respect of vessel operations.

It is respectfully suggested that, if the delegatory language of OPA 90 has any force, it can only be construed in compliance with and in furtherance of actual Coast Guard regulation. Such language may not empower the states to create new or dissonant regulations because they would exceed Congress' power under the principles stated in the cases above.

CONCLUSION

This honorable Court is requested to reaffirm that the states may not be given by Congress the power to create unharmonious regulation of interstate and international commerce. It is a matter of the commercial lifeblood of this country.

Dated: October 21, 1999

Respectfully submitted,

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BRIEF FOR THE INTERNATIONAL CHAMBER OF SHIPPING AND THE INTERNATIONAL GROUP OF PROTECTION AND INDEMNITY CLUBS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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**BRIEF FOR
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PROTECTION AND INDEMNITY CLUBS
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

INTEREST OF THE *AMICI CURIAE* [1]

Formed in 1921, the International Chamber of Shipping ("ICS") is the trade association for the international shipping industry. Its membership comprises shipowners' associations and shipping companies from thirty-nine countries (including the

[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amici curiae* made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

United States and Canada), representing more than half of the world's merchant shipping tonnage.[2]

Since 1961, ICS has held consultative status before the International Maritime Organization ("IMO"), the United Nations agency responsible for safety of life at sea and pollution prevention.[3] In that capacity, as the principal voice of the international shipping industry, ICS has actively participated, along with the United States and other interested nations, in the formulation of numerous international treaties and conventions promoting both maritime safety and environmental protection. Those treaties and conventions include the International Convention for the Safety of Life at Sea, 1974, and its Protocol of 1978 ("SOLAS"); the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 ("STCW"), and the 1995 amendments thereto; and the International Convention for the Prevention of Pollution from Ships, 1973, and its 1978 Protocol ("MARPOL"). These treaties are subject to continuing amendment under the auspices of the IMO.

The International Group of Protection and Indemnity Clubs also holds consultative status before the IMO. It consists of fourteen nonprofit, mutual insurance companies ("the Clubs") which insure the liabilities of their shipowner members. Together the Clubs insure the liabilities of over 95% of the world's ocean

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[2] The full members of ICS are the shipowners' associations of Argentina, Australia, Austria, Barbados, Belgium, Bulgaria, Canada, Chile, Croatia, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Israel, Italy, Japan, Kuwait, Liberia, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Pakistan, Russia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. The associate members represent shipowners in Abu Dhabi, India, Jordan, and Panama.

[3] Consultative status is granted by the IMO only to organizations which "can reasonably be expected to make significant contribution to the work of" the IMO, and which "are truly international and are active and effective in their field." IMO Guidelines on the Grant of Consultative Status.

going merchant fleet, including effectively all oil tankers and almost all dry cargo ships trading to the United States. The Clubs are linked by reinsurance arrangements covering the larger liability risks of shipowners worldwide. They are actively involved in claims handling for their shipowner members, including the appointment of lawyers, surveyors, and other experts, and the swift settlement of claims.

The State of Washington regulations at issue in this case impose new, localized requirements on U.S. and foreign tank-vessel operations, equipment, staffing, and personnel training. The regulations are enforced through fines, penalties, and the exclusion of vessels from ports in the State of Washington. They fly in the teeth of the obligations of the United States under SOLAS and STCW to allow unhindered access to U.S. ports and transit through U.S. waters to all vessels that comply with these international regimes. Such unilateral measures by local authorities of a major coastal nation threaten the integrity of the international treaty regime in which *amici curiae* and their members have a huge stake.

INTRODUCTION AND SUMMARY OF ARGUMENT

In our view this case turns entirely on the meaning of § 1018 of the Oil Pollution Act of 1990 ("the OPA"), 33 U.S.C. § 2718, and in particular on the meaning of the word "requirements" therein. The presence of that word in § 1018 permitted the Ninth Circuit to rule that Congress intended to authorize the States *and their political subdivisions* to enact "oil-spill prevention rules," and thus directly to regulate instruments of foreign commerce, in an area fraught with national foreign policy concerns and historically governed by federal statutes implementing international agreements. U.S. Pet. App. at 11a.[4]

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[4] Section 1018(a) provides in relevant part that "Nothing in this Act * * * shall * * * be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to" the discharge of oil or removal activities in connection with such a discharge. Section 1018(c) says the

We believe that construction of § 1018 to be demonstrably incorrect for a host of reasons that show, instead, that Congress in § 1018 meant only to maintain the status quo allowing the states to set their own financial liability standards for oil pollution incidents. Those reasons include –

(1) that § 1018 appears in Title I of the OPA, which is entitled "Oil Pollution Liability and Compensation" and refers not only to "this Act" but also to the Act of March 3, 1851, 46 U.S.C. App. § 183, a limitation of liability statute, and to 26 U.S.C. § 9509, which creates the Oil Spill Liability Trust Fund, all of which suggests that § 1018 should be restricted to liability standards;

(2) that the presence of non-preemption "savings" clauses in other OPA Titles (including Title IV, dealing with the prevention of oil spills), would be superfluous if § 1018 is read to reach all of the OPA;[5]

(3) that § 310 of Senate Bill 686, which would have explicitly authorized the states to regulate tanker safety, was deleted by the Conference Committee;[6]

(4) that Congress endorsed and intended the OPA to have no impact on *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 177

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same with respect to "the authority of the United States or any State or political subdivision thereof * * * to impose additional liability or additional requirements * * * relating to the discharge, or substantial threat of a discharge, of oil." 33 U.S.C. § 2718.

[5] See § 4202(c) (Title IV), § 5002(n) (Title V), and § 8202 (Title VIII), codified respectively at 33 U.S.C. §§ 1321(o)(2) and 2732, and 43 U.S.C. § 1656(e).

[6] That provision stated: "Nothing in this title shall be construed or interpreted as changing, diminishing, or preempting in any way the authority of a State, or any political subdivision thereof, to regulate oil tankers in State waters." See 135 Cong. Rec. 18,745 (1989).

(1978),[7] which held among other things that, in enacting Title I of the Ports and Waterways Safety Act of 1972, Congress intended "that there would be a single decisionmaker, rather than a different one in each State," for the promulgation of safety standards applicable to tankers entering U.S. ports;

(5) that the word "requirements," the *sine qua non* of the Ninth Circuit's ruling that § 1018 permits the states to legislate with respect to vessel staffing and operational "requirements" to prevent spills, was intended by Congress to refer to *financial responsibility* requirements, a construction which harmonizes the term "requirements" with its surroundings and which the Conference Committee understood to be correct;[8]

(6) that the United States has never ratified any of the international conventions concerning financial liability for maritime environmental accidents,[9] making it all the more plausible that Congress would continue to permit the States to act in this area; and finally,

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[7] See H.R. Conf. Rep. No. 101-653, at 122 (1990), *reprinted in* 1990 U.S.C.C.A.N. 800: "The Conference substitute does not disturb the Supreme Court's decision in *Ray* v. *Atlantic Richfield Company*, 435 U.S. 151 (1978)."

[8] See H.R. Conf. Rep. No. 101-653, at 121–122 (1990), *reprinted in* 1990 U.S.C.C.A.N. 799–800:

> "Both [Senate and House versions] preserve the authority of any State to establish or maintain funds for cleanup or compensation purposes and to collect any fees or penalties imposed under State law. Both provisions also authorize States to enforce *the financial responsibility requirements* of this Act on their own navigable waters." (Emphasis added.)

States may have reason to impose financial responsibility requirements on vessel operators not only for a discharge but also for a "substantial threat of a discharge," see § 1018(c), in circumstances where, for example, a ship founders, collides with another ship, or runs aground, and requires rescue operations for which it must bear financial responsibility.

[9] See *infra* p. 10 note 19.

(7) that § 1018 must be construed in the context of an international regime of treaties and conventions governing maritime safety and environmental protection, a regime in which the United States has played a pivotal role and which imposes compliance duties on the United States with which the Washington regulations interfere.

Amici will focus on this last point. We show in Part I below that the United States, actively participating through the International Maritime Organization, has been a leading party to the enormous recent growth in the establishment of international treaties and conventions setting comprehensive standards for vessel operations and crew competence as well as design and construction. Contrary to the view of the Ninth Circuit, the federal government's authority to construe and implement its treaty obligations, and its power even to enact legislation that is arguably inconsistent with international standards, offers no justification for the conclusion that Congress has forsaken the need for international regulation of the maritime industry and the ability of the United States to speak with one voice in the international maritime community.

In Part II we show in closer detail that treaties to which the United States is a party require the United States to accept certifications of vessel compliance with international standards issued by the vessels' so-called "flag states." Those treaties carefully govern the circumstances under which the United States may deny entry to or detain certificated vessels. If allowed to stand, the Washington State regulations would put the United States in violation of those treaties, jeopardize its ability to exercise its foreign affairs power so as to achieve and maintain international consensus on marine environmental protection measures, and significantly burden the international shipping community.

In sum, a sound consideration of the background of the United States' vigorous and sustained support for international standards, and its resultant treaty obligations, confirms the teaching of the other congressional indicia mentioned above—that Congress in

passing the OPA did not intend to authorize every coastal state—and their political subdivisions—to clutter the international maritime stage with independently enforceable standards for U.S. and foreign flag vessel staffing, training, and operations. Not a whisper in the legislative history of the OPA hinted at so fundamental a reallocation of federal-state powers in the international arena. Indeed, Congress expressly *rejected* a provision which would have permitted state regulation of tanker safety. See p. 4 & note 6, *supra*. Accordingly, the Ninth Circuit erred in refusing sensibly to interpret the word "requirements" in § 1018 to mean financial responsibility requirements, not vessel operations requirements, and in attributing to Congress the intent to invite treaty violations and frustrate the ability of the United States to conduct its foreign affairs. Its decision should be reversed.

ARGUMENT

I

International Conventions To Which The United States Is A Party Have Established Comprehensive Standards For Vessel Operation, Crew Competence, Construction, And Design.

As the Court has recognized, in Title II of the Ports and Waterways Safety Act of 1972 ("PWSA"), Pub. L. No. 92-340, 86 Stat. 424, Congress entrusted to the Secretary of Transportation "the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 163 (1978). In reaching that conclusion the Court relied in part on the PWSA legislative history stating Congress' view "'that multilateral action with respect to comprehensive standards for the design, construction, maintenance and operation of tankers for the protection of the marine environment would be far preferable to unilateral imposition of standards.'" *Id.* at 166 n.16 (quoting S. Rep. No. 92-724, at 23 (1972)). In part because of this "expressed * * * preference for international action," the Court held that

Congress had left "no room" for the States to act with respect to the design and construction regulations at issue in that case. *Id.* at 167–68.

Events since *Ray* only demonstrate the continuing—indeed the increasing—United States commitment to the regulation of the worldwide shipping industry through international agreements—with respect not only to design and construction but also to operations and crew training.

A. International Shipping Standards Have Proliferated In Recent Years.

Recent international efforts have produced an enormous growth in conventions, protocols, and other treaties intended to prevent and remediate marine pollution and protect the safety of life and property at sea. This body of treaty law—most of which has been completed and become effective in the past twenty-five years—consists of hundreds of pages of regulations and standards governing the international shipping industry, covering operating standards, management practices, and seafarer qualification and training, as well as vessel design and construction.

In the early 1970's, the international community had agreed on initial versions of three of the principal conventions governing the maritime industry today: (1) the 1972 Convention on the International Regulations for Preventing Collisions at Sea ("COLREGS"),[10] which established navigational rules and safety standards for ships; (2) the 1973 International Convention for the Prevention of Pollution from Ships ("MARPOL"),[11] which established operation, design, and equipment requirements to prevent marine pollution; and (3) the 1974 International Convention for the Safety of Life at Sea ("SOLAS"),[12] which

[10] 28 U.S.T. 3459, 1050 U.N.T.S. 16, as amended, 35 U.S.T. 575, 1323 U.N.T.S. 353, *reprinted in* 6 Benedict on Admiralty Doc. No. 3-4 (7th rev. ed. 1999).

[11] 34 U.S.T. 3407, 1313 U.N.T.S. 3 (entered into force Mar. 30, 1983).

[12] 32 U.S.T. 47, 1184 U.N.T.S. 2 (entered into force May 25, 1980).

established safety requirements for vessel design, construction, and equipment.

Extensive Protocols to both SOLAS and MARPOL, setting forth the great bulk of the substantive standards that these Conventions contemplated, were completed in 1978, the year that *Ray* was decided.[13] To sharpen the SOLAS Convention's focus on preventing marine pollution, it was further amended in 1994 to require vessel operators to implement safety management systems in compliance with an International Safety Management Code ("ISM Code"). See SOLAS Annex Ch. IX.[14]

The primary convention directed at seafarer qualification, certification, training, and operational practices, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers ("STCW"), was completed in initial form in 1978.[15] As with SOLAS and MARPOL, the majority of the substantive standards established under the STCW appear later, in a "Code" adopted in 1995. The STCW Code spans approximately 260 printed pages and includes both mandatory provisions (Part A) and advisory standards that the parties are encouraged to use in implementing the Convention's requirements (Part B).[16]

[13] 17 I.L.M. 546 (1978), 1340 U.N.T.S. 61 (1978 MARPOL Protocol) (entered into force Oct. 2, 1983). The current version of MARPOL, together with its 1978 Protocol, is reprinted at 6A Benedict on Admiralty Doc. No. 6-1. The 1978 SOLAS Protocol appears at 32 U.S.T. 5577, 1226 U.N.T.S. 237 (entered into force May 1, 1981).

[14] The current version of SOLAS, together with the 1978 Protocol and later amendments, is reprinted at 6D Benedict on Admiralty Doc. No. 14-1. The ISM Code is reprinted at *id.* Doc. No. 14-2.

[15] S. Exec. Doc. No. 96-1 EE (1979), 1361 U.N.T.S. 2 (entered into force Apr. 28, 1984, for the United States Oct. 1, 1991).

[16] The current version of the STCW Convention and Annex, as amended, is reprinted at 6D Benedict on Admiralty Doc. No. 14-6. The STCW Code, however, does not appear there; it appears at <http://www.amsa.gov.au/imo/secure/codes-conventions/code-stcw-at2.html>.

Finally, in 1994, the 1982 United Nations Convention on the Law of the Sea went into effect.[17] That Convention is an umbrella agreement that, among other things, requires regional and global cooperation to formulate international rules and standards to prevent, reduce, and control pollution from vessels.

SOLAS, STCW, MARPOL, COLREGS, and the Law of the Sea Convention are the principal conventions governing maritime safety and environmental protection.[18] The existence and widespread acceptance of these conventions and codes—which are subject to ongoing review and revision—demonstrates the desire of the international maritime community to address the safe operation of cargo and tanker vessels at the international level, rather than leaving it to independent regulation by the various coastal states of the world.[19]

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[17] S. Treaty Doc. No. 103-39 at 99 (1994), 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994), *reprinted in* 6C Benedict on Admiralty Doc. No. 10-6.

[18] For an excellent description of the history and basic import of these treaties and conventions, see Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. Mar. L. & Com. 565 (1998).

[19] The international community has also adopted international rules on liability for vessel pollution. The 1969 International Convention on Civil Liability for Oil Pollution Damage imposed strict liability on vessel owners, limited liability, specified recoverable damages, and required insurance. 973 U.N.T.S. 3, *reprinted in* 6A Benedict on Admiralty Doc. No. 6-3. The 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage provided a limited fund for damages not compensable by the vessel owner or by insurance. 1110 U.N.T.S. 57, *reprinted in* 6A Benedict on Admiralty Doc. No. 6-8. Later protocols have increased the monetary limits. See *id.* Doc. Nos. 6-4, 6-4A, 6-4B, 6-9, 6-9A, and 6-9B. Consistent with its long-standing view that these limits are too low, and its decision to permit the individual states to impose their own damage and liability statutes for pollution from ships, see, *e.g.*, OPA § 1018, the United States has not ratified these conventions.

B. The United States' Role In And Preference For The International Regime.

Almost all of the international efforts described above have occurred under the auspices of the International Maritime Organization ("IMO"), the United Nations' specialized agency responsible for "encourag[ing] and facilitat[ing] the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships."[20] It "has sponsored some forty international conventions, protocols, and other treaties, as well as hundreds of international codes and recommendations."[21]

From the beginning the United States has served on the IMO Council, its elected executive body, and has played an active role in the IMO and in the adoption and implementation of the standards agreed upon in IMO conventions. That role has been consistent with the United States' position as an "outspoken supporter of international conventions which set international standards for vessel safety and pollution prevention." Allen, *supra* note 10, at 578.

The United States has also implemented internationally adopted standards into its own domestic law, in accordance with the international regime. Thus, the United States is a party to the 1972 COLREGS Convention and has implemented its requirements in 33 C.F.R. Parts 80–82. It is also a party to the 1973 MARPOL Convention and has implemented many of the MARPOL requirements applicable to tanker vessels in the Port and Tanker Safety Act of 1978 ("PTSA"), see 46 U.S.C. Ch. 37, and in Coast Guard regulations, see 33 C.F.R. Parts 151, 155, 157,

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[20] See Convention on the Intergovernmental Maritime Consultative Organization, Pt. I, Art. 1(a), 9 U.S.T. 621, 289 U.N.T.S. 3 (1948), as amended, *reprinted in* 6C Benedict on Admiralty Doc. No. 12-1.

[21] Allen, *supra* note 18, at 579. Many of the IMO-sponsored conventions are collected in 6D and 6E Benedict on Admiralty Ch. XIV (7th rev. ed. 1999).

158, establishing standards for the design, equipment, and operations of oil tank vessels.

The United States is a party to the SOLAS Convention and has implemented its requirements for U.S.-flag vessels in various provisions of Titles 33 and 46 of the U.S. Code and in many Coast Guard regulations. Among other things, Congress in 1996 directed the Secretary to prescribe regulations consistent with the new International Safety Management Code adopted in the 1995 amendments to the SOLAS Convention,[22] and the resulting Coast Guard regulations appear at 33 C.F.R. Part 96.

The United States is also a party to the STCW Convention and its 1995 amendments. The amendments (including the STCW Code) were implemented in Coast Guard regulations effective July 28, 1997. 62 Fed. Reg. 34,506 (June 26, 1997) (interim rule with request for comments), amending 46 C.F.R. Parts 10, 12, and 15.

The United States initially declined to become a party to the Law of the Sea Convention because it disagreed with the Convention's provisions concerning deep-sea mining. In 1994, however, an agreement was reached ameliorating the United States' concerns, and the President submitted the amended Convention to the Senate for ratification. S. Treaty Doc. No. 103-39 (1994) (agreement also reprinted in 6C Benedict on Admiralty Doc. No. 10-6A). The United States had previously declared its intent to follow most provisions of the Convention (since they codify principles of customary international law that the United States accepts), and the President's message in 1994 stated that the United States "intends to apply the agreement provisionally pending ratification." S. Treaty Doc. No. 103-39, at VIII.

The United States' implementing statutes and regulations we have just discussed overwhelmingly reflect internationally agreed-upon standards, in accordance with the United States' continuing

[22] See 46 U.S.C. § 3203 (Supp. III 1997), added by § 602(a) of the Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, 110 Stat. 3928.

commitment to the international regime. See, *e.g.*, S. Treaty Doc. No. 103-39, at III ("The United States has basic and enduring national interests in the oceans and has consistently taken the view that the full range of these interests is best protected through a widely accepted international framework governing uses of the sea."); *Harmonization With International Safety Standards*, 61 Fed. Reg. 58,804 (Nov. 19, 1996) (notice of proposed rulemaking) (Coast Guard's goal is to "harmonize Coast Guard regulations with international safety standards"); 62 Fed. Reg. 51,188 (Sept. 30, 1997) (final rule) (amending numerous parts of C.F.R. Titles 33 and 46).

C. The Ninth Circuit Erroneously Belittled The Commitment Of The United States To Uniform International Standards.

In its earlier decision in *Chevron U.S.A., Inc.* v. *Hammond*, 726 F.2d 483, 493–94 (9th Cir. 1984), the Ninth Circuit ruled that Congress believes "that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction." The Ninth Circuit repeated that conclusion in its decision upholding all but one of the Washington regulations at issue here. U.S. Pet. App. at 17a–19a. The court's view was based on what is now 46 U.S.C. § 3703(a), which authorizes the Secretary to prescribe regulations for the "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning" of tanker vessels and states that the Secretary "may prescribe regulations that exceed standards set internationally."[23] See 726 F.2d at 493–94.

In some circumstances the international regime itself permits nations to implement somewhat varying standards—particularly

[23] Section 3703(a) is a successor to a provision enacted by § 5 of the PTSA, Pub. L. No. 95-474, 92 Stat. 1483, formerly codified at 46 U.S.C. § 391a(6).

within their territorial waters.[24] Section 3703(a) thus authorizes the Secretary, when he or she can do so consistent with the United States' treaty obligations, to enact specific standards that may differ from international norms.[25] It does not follow, however, that the coastal states and their political subdivisions may independently decide to enact standards that differ from international norms, regardless of treaty obligations, or that the United States is not fully committed to the establishment of uniform national regulation in essential accord with international standards. Indeed, the authorization that permits the Secretary to exceed international standards is most consistent with a congressional intent that *only* the Secretary may do so.

It is one thing for the United States to enact, in select circumstances, a requirement that may differ from international norms. The United States is a principal participant in the international shipping regime. Its views have special weight and

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[24] See, *e.g.*, SOLAS Annex, Ch. V, Reg. 13 (providing guidelines for nations to follow in setting vessel-specific manning requirements); Law of the Sea, Pt. XII, Sec. 5, Art. 211 Paras. 3–6 (permitting parties to adopt and apply special laws and requirements in some circumstances).

[25] Treaties such as SOLAS and the STCW may require international uniformity in many respects. In our view it is highly doubtful whether § 3703(a) can be construed to permit the United States to impose standards different from those mandated in treaties to which the United States is a party, for Congress would not lightly authorize violation of an international agreement. Hence it is reasonable to construe § 3703(a) *not* to authorize the Secretary to do so. That construction is particularly appropriate with respect to SOLAS, the current version of which entered into force in 1980, two years after enactment of the PTSA, see U. S. Dep't of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1999*, at 415 (available at <http://www.acda.gov/state>), and with respect to STCW, which entered into force for the U.S. in 1991, *see id.* at 416, thirteen years after the PTSA. It makes little sense to interpret a congressional provision to authorize the violation of treaties that have not yet been ratified or approved by the United States, especially since treaties supercede previously enacted statutes. See Restatement (Third) of the Foreign Relations Law of the United States § 115 (1987).

may be taken by the international community as persuasive evidence that the standard in question permits or should be changed to adopt such a requirement. Moreover, the United States—which will have to respond to any protests that might ensue—is in a position to gauge the international consequences of its actions, and to balance our overall domestic interests against any international repercussions.[26]

It is quite another thing for one of many coastal states of the United States, or the political subdivisions thereof, to take such action. The individual states and their political subdivisions have not been formal participants in developing the international regime. Their views do not necessarily represent but indeed may conflict with the views of the United States. Indeed, different coastal states and their political subdivisions may adopt different and even conflicting requirements among themselves. In short, whatever powers § 3703(a) may be seen to have conferred on the United States, that provision should not be seen as evincing a lack of U.S. support for the international regime, least of all as support for the conclusion that Congress intended a state-and-municipality-led Balkanization of regulatory requirements within the United States as well as in the international community.

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[26] After due consideration of these factors, for example, the United States has required certain foreign tankers entering United States waters to be double-hulled. See 46 U.S.C. § 3703a, added by OPA § 4115(a). The United States then declined to accept the amendments to the MARPOL Convention that would have required it to accept vessels that did not meet the federal double-hull requirement. See 56 Fed. Reg. 44,051–52 (Sept. 6, 1991). It thereby ensured—as MARPOL permitted—that the conflicting amendment would not enter into force in the United States, while the United States remained a party to the remaining aspects of the MARPOL regime. See MARPOL Art. 16(4)(b) ("Any party which has declined to accept an amendment to an Annex shall be treated as a non-Party only for the purpose of application of that Amendment."). Hence the double-hull requirement did not ignore U.S. obligations under applicable conventions.

D. Summary.

We have shown that the United States has helped to create, and has ratified and implemented through an extensive body of domestic law, numerous treaties establishing internationally agreed-upon standards to insure maritime vessel safety and environmental protection. The Ninth Circuit has ruled that in § 1018 the United States abandoned its commitment to international consensus and national uniformity and announced its intent to substitute a scheme of potentially conflicting regulation by dozens of individual states and municipalities. Given the United States' history of leadership and support for the international regime, it seems to us inconceivable that such a congressional about-face would not have been reflected either in clear language in the OPA or at least in extensive legislative history. That is especially true in light of the grave consequences of such a congressional decision, a subject to which we now turn.

II

Permitting State Co-Regulation Would Put The United States In Violation Of Specific Treaty Obligations And Have A Profound Adverse Impact On U.S. Foreign Relations And International Commerce.

If the Court of Appeals' interpretation of § 1018 is correct, then Congress has authorized the individual states and their political subdivisions to place the United States in direct violation of international treaty obligations; has seriously undermined the executive branch's ability to exercise its foreign affairs power to achieve international consensus on measures for environmental protection and other purposes; and significantly burdened foreign commerce. A congressional intent to permit these consequences must be clearly expressed. See, *e.g.*, *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("'A treaty will not be deemed to have been abrogated * * * by a later statute unless such purpose on the part of Congress has been clearly expressed.'") (quoting *Cook* v. *United States*, 288 U.S. 102, 120 (1933)).

A. Enforcement Of The Washington Regulations Will Violate Specific United States' Treaty Obligations.

The treaties we have been discussing, and in particular the STCW and SOLAS, establish a specific procedure for implementing and enforcing the standards they set, based on principles of international comity and respect. As we show below, "flag states" are obligated to implement the treaties' substantive requirements, to inspect vessels entitled to fly their own flags, and to issue certificates demonstrating that those vessels and their crews in fact comply with the international standards as implemented. Except in limited circumstances, "port states" are obligated to accept flag state certification that the vessel in question and its crew comply with international standards, and may not detain or interfere with foreign vessels unless specified conditions are met and prescribed diplomatic procedure is followed. As we shall see, by purporting to penalize or exclude vessels that comply with international standards, and by ignoring international protocols, the State of Washington will place the United States in direct violation of its specific treaty obligations.[27]

1. The enforcement scheme under both the STCW and SOLAS establishes clear duties for flag states and for port states, respectively. Flag states must implement the substantive international standards set by the treaties. Thus, Article I of the STCW provides: "The Parties undertake to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary to give the [STCW] full and complete effect, so as to ensure that, from the point of view of safety of life and property at sea and the protection of the marine environment,

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[27] Other Conventions that lend themselves to enforcement through a system of inspections and certificates, specifically MARPOL and the Law of the Sea Convention, set forth similar procedures to the STCW and SOLAS. See MARPOL Art. 5 & Annex I, Regs. 4-8A; Law of the Sea Convention Art. 217, Paras. 1, 3. We discuss only the STCW and SOLAS here because the Washington regulations that the Court of Appeals upheld primarily implicate the standards set and certificates issued under those treaties.

seafarers on board ships are qualified and fit for their duties." STCW, Art. I(2). Flag states must then issue "[c]ertificates * * * to those candidates who, to the satisfaction of the [flag state], meet the requirements for service, age, medical fitness, training, qualification and examinations in accordance with the appropriate provisions of the Annex to the Convention." STCW, Art. VI(1).

Similarly, under SOLAS, the governments that have ratified or acceded to the treaty were required to "promulgate all laws, decrees, orders and regulations and * * * take all other steps which may be necessary to give [the treaty] full and complete effect,"[28] and to periodically inspect vessels flying their flags for compliance with the standards and requirements set forth in the treaty. See SOLAS Annex, Ch. I, Pt. B, Regs. 6(a), 8–10, 12; SOLAS Annex, Ch. IX, Regs. 3–4.

Once the treaties have been implemented and ships and seafarers certified for compliance by the flag states, port states are obligated to accept those certificates except in specifically defined circumstances. The STCW provides that certificates issued by a vessel's flag state "shall be accepted unless there are clear grounds for believing that a certificate has been fraudulently obtained or that the holder of a certificate is not the person to whom that certificate was originally issued," STCW, Art. X(1), or if there are "clear grounds"—as defined in the treaty—"for believing that [international] standards are not being maintained." STCW Annex, Reg. I/4(1.3).

SOLAS similarly provides: "Certificates issued under the authority of a Contracting Government shall be accepted by the other Contracting Governments for all purposes covered by the present Convention," with limited exceptions. SOLAS Annex, Ch. I, Pt. B, Reg. 17; *id.* at Ch. XI, Reg. 4(1).

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[28] This language appears in Article I, Paragraph (b) of SOLAS as enacted in 1974. SOLAS and the Annex thereto have been subsequently amended, and Article I now provides simply that the "Parties to the present Protocol undertake to give effect to the provisions of the present Protocol and the Annex hereto * * *." SOLAS Protocol 1988, Art. I, Para. 1.

2. The treaties strictly limit the control a port state is permitted to exercise over a foreign vessel.[29] The STCW provides that foreign vessels shall be subject to control *only* "by officers duly authorized by [a] Party" to the Convention. STCW, Art. X(1). Regulation I/4 of the STCW Annex then specifies that a port state, acting through a duly authorized control officer, may exercise control over a foreign vessel only for the following three purposes: (1) verification that "all seafarers serving on board who are required to be certificated * * * hold an appropriate certificate * * *";[30] (2) "verification that the numbers and certificates of the seafarers serving on board are in conformity with the applicable safe manning requirements" for that vessel set by that vessel's flag state;[31] and (3) "assessment, in accordance with Section A-I/4 of the STCW Code, of the ability of the seafarers of the ship to maintain watchkeeping standards as required by the Convention if there are clear grounds for believing that such standards are not being maintained * * *."

A port state has "grounds for believing" that international standards are not being maintained only if:

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[29] The limitations would not necessarily prevent a port state from exercising control over a foreign flag vessel for reasons outside the ambit of the treaty. In the absence of the STCW, for example, SOLAS itself—which does not address issues of seafarer qualification and training—might not prohibit the United States from inspecting or detaining foreign ships to determine compliance with applicable standards on those matters. However, all the Washington regulations at issue here address matters squarely within the scope of these two treaties.

[30] Similarly, Paragraph (1) of Article X provides that foreign ships "while in the ports of a Party [are subject] to control by officers duly authorized by that Party to verify that all seafarers serving on board who are required to be certificated by the Convention are so certificated or hold an appropriate dispensation."

[31] SOLAS requires contracting governments to establish and maintain measures to ensure that all ships are sufficiently and efficiently manned. SOLAS Annex, Ch. 5, Reg. 13(a).

".3.1 the ship has been involved in a collision, grounding or stranding, or

".3.2 there has been a discharge of substances from the ship * * * which is illegal under any international convention, or

".3.3 * * * routing measures adopted by the [IMO] or safe navigation practices and procedures have not been followed, or

"3.4 the ship is otherwise being operated in such a manner as to pose a danger to persons, property or the environment." STCW Annex, Reg. I/4(1.3).

Deficiencies that might "pose a danger to persons, property or the environment" are defined as: (1) failure of seafarers to hold a valid certificate under the Convention, (2) failure to comply with the flag state's safe manning standards for that vessel, (3) "failure of navigational or engineering watch arrangements to conform to the requirements specified for the ship by the [flag state]", (4) "absence in a watch of a person qualified to operate equipment essential to safe navigation, safety radiocommunications or the prevention of marine pollution," and (5) "inability to provide for [continuous watches by] * * * persons who are sufficiently rested and otherwise fit for duty." STCW Annex, Reg. I/4(2).

In short, as we have seen, the STCW strictly limits the circumstances under which a port state may detain or otherwise interfere with a foreign flag vessel entering its waters.

In addition, under Article X of the STCW, if a vessel is found not to comply with international standards in accordance with its certificate, the control officer must follow a prescribed procedure for addressing those deficiencies. "[A]ll possible efforts shall be made to avoid a ship being unduly detained or delayed," and a vessel "shall be entitled to compensation for any loss or damage" resulting from an undue detention or delay. Art. X(4). As noted above, deficiencies that may be deemed a danger to persons, property or the environment are spelled out in Paragraph 1.3 of Regulation I/4 of the Annex, and are "the only grounds * * * on

which a Party may detain a ship." STCW Annex, Reg. I/4(3). The control officer must "forthwith inform, in writing, the master of the ship and the [flag state's] Consul or * * * diplomatic representative or * * * maritime authority," and specify "the details of the deficiencies found and the grounds on which the Party determines that these deficiencies pose a danger to persons, property or the environment." Art. X(2). If those deficiencies are not corrected, the vessel may continue to be detained, but "the facts concerning the action taken shall be reported promptly to the Secretary-General" of the IMO. Art. X(3).

A parallel control procedure applies under SOLAS: ships are subject to port state control *only* "by officers duly authorized by [a Contracting] Government." SOLAS Annex, Ch. I, Pt. B, Reg. 19(a). Duly authorized officers may exercise control only "in so far as this control is directed towards verifying that the certificates issued [by the flag state] * * * are valid," *id.*, or "when there are clear grounds for believing that the Master or crew are not familiar with essential shipboard procedures relating to the safety of ships." *Id.*, Ch. XI, Reg. 4(1). Again, "all possible efforts shall be made to avoid a ship being unduly detained or delayed," and the control officer must promptly "inform, in writing, the [flag state's] Consul or * * * nearest diplomatic representative * * * of all the circumstances in which intervention was deemed necessary." *Id.*, Ch. I, Pt. B, Reg. 19. Ships are entitled to compensation for any loss or damage incurred as a result of undue detention. *Id.*.

Thus, the STCW and SOLAS provide for a regime in which international standards for (among other things) the management, operation, and staffing of vessels are implemented, and compliance enforced, by the country whose flag a particular vessel flies. Except where there are "clear grounds" for believing that those standards are not being met, other parties to the Convention are obligated to accept that those vessels are sufficiently safe and their crews adequately qualified and trained, and to refrain from delaying or detaining them in their voyages. Any delay or detention of a foreign flag vessel is considered a serious matter

which requires prompt notification to both the IMO and the diplomatic representative of the flag state.

3. In accordance with its treaty obligations in this regard, the United States does in fact recognize foreign certificates as proof of compliance with applicable international (and U.S.) standards, and permits foreign flag vessels meeting those safety standards to enter U.S. ports. Congress has provided that foreign tankers must have a certificate of compliance issued by the Secretary in order to operate on the navigable waters of the United States, which certificate "may issue * * * only after the vessel has been examined and found to be in compliance with this chapter and regulations prescribed under this chapter." 46 U.S.C. § 3711(a). However, "[t]he Secretary may accept any part of a certificate * * * issued by the government of a foreign country under a treaty * * * to which the United States is a party, as a basis for issuing a certificate of compliance." *Id.* Thus, Congress permits the executive branch, in the concurrent exercise of its foreign affairs and domestic enforcement powers, to accept foreign certificates evidencing compliance with international standards in lieu of actually inspecting vessels for compliance with United States' standards. Congress' intention to accept compliance with international standards in place of United States' standards is further evidenced in § 9101 of Title 46, which deals with tank vessel manning requirements and requires the Secretary to determine whether a "foreign country has standards for licensing and certification of seamen that are at least equivalent to United States law *or* international standards accepted by the United States." 46 U.S.C. § 9101(a)(2)(A) (emphasis added).[32]

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[32] In recent years the international community has expressed rising concern and taken action to deal with some governments' repeated failure to comply with their treaty obligations to enforce international standards. Reflecting that concern, the 1990 amendment to § 9101 further provided that, if "the Secretary determines * * * that a country has failed to maintain or enforce standards at least equivalent to United States law or international standards accepted by the United States," the Secretary must exclude vessels certificated by that country unless "the owner or operator of the vessel establishes * * * that the vessel is not unsafe or a threat to the marine environment." 46 U.S.C. § 9101(a)(3) & (4)(A). A few years later, at the direction of the Senate Appropriations Committee, the U.S. Coast Guard launched a Port State Control Initiative to more clearly identify those vessels that might be "substandard" due, among other reasons, to "gross noncompliance with equipment standards or arrangements under U.S. laws or international conventions," or "noncompliance with the operational and/or manning standards required by U.S. laws or international conventions." 59 Fed. Reg. 36,826, 36,827 (July 19, 1994). These efforts to deal with what are essentially chronic scofflaw governments do not reflect diminished U.S. commitment to its treaty obligations.

4. The Washington regulations at issue here fly in the face of the concrete obligations the United States has assumed under the STCW and SOLAS. They purport to assert for the State of Washington authority over foreign vessels that is committed by the treaties solely to a control officer duly authorized by the port state "Administration"—here, the United States Coast Guard. Then, contrary to the United States' obligation to accept the certificates of the other nations as proof that the certificated vessels and their crew will, through compliance with those standards, adequately protect life, property, and the marine environment, the Washington regulations simply ignore the foreign certifications and flatly prohibit entry into Washington state waters of foreign vessels that the state has not independently determined to be safe. Intertanko Pet. App. at 308a.

As a consequence of their failure to respect foreign certifications, the Washington regulations contravene the strict limitations on the control that the United States is permitted to exercise over a foreign vessel under the STCW and SOLAS and permit the state to delay or detain foreign flag vessels despite the lack of any "clear grounds" for believing that international standards are not being maintained. Finally, the Washington regulations permit the state to interfere with a foreign flag vessel's passage without following the careful diplomatic procedures prescribed by the treaties. In all of these respects, enforcement of the Washington regulations would place the United States in direct violation of its treaty obligations to foreign governments.

When previously faced with state law that interfered with the policies and obligations set forth in an international agreement, this Court has not hesitated to hold that the state law "must yield". See, *e.g.*, *United States v. Pink*, 315 U.S. 203, 230–31 (1942). There the Court noted:

> "[T]he field which affects international relations is 'the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority' * * * . * * * If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power." *Id.* at 232 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 68 (1941)).

The difficulties the Court foresaw in *Pink* are concretely presented by this case: if the Ninth Circuit was correct in its interpretation of § 1018, it is not just the STCW and SOLAS obligations that are in jeopardy, and not just the State of Washington that may cause violations for which the United States will have to answer. Any one of the twenty-three coastal states of the United States—and their political subdivisions—may then enact maritime regulations that violate these or other provisions of the dozens of international treaties, agreements, and protocols governing maritime issues to which the United States is party, creating diplomatic incidents and the potential for retaliation and/or reparation obligations. It is difficult to believe that Congress intentionally permitted such a result.

B. State Co-Regulation Would Undermine The United States' Foreign Affairs Power.

In addition to sanctioning the potential violation of international treaties, giving each of the coastal states and their political subdivisions the authority to enact and enforce their own regulations governing the operation and staffing of foreign flag vessels would undermine the United States' ability to continue to seek (and to achieve) international consensus on stricter maritime standards. As an active participant in the IMO since its founding,

the United States has been instrumental in bringing the vast majority of maritime nations to agreement on a comprehensive set of standards, embodied in a handful of principal treaties and a host of other protocols and conventions, that protect the marine environment and the safety of life and property at sea. Over time, through amendments and additions to the various treaties, these standards have become stricter and more detailed. Yet the IMO's and United States' work is far from completed. To cite just one current example, the United States is working through the IMO to obtain international agreement on the double-hull requirement for tankers that Congress enacted into U.S. domestic law in 1990. See 46 U.S.C. § 3703a.

The United States' credibility in this arena and the success of its efforts depend largely on its ability to speak with one voice and to demonstrate its own willingness to abide by and support the standards it recommends to the rest of the world. As Congress noted in legislative history accompanying the Coast Guard Authorization Act of 1996:

> "As a matter of Constitutional law, the Federal Government has responsibility for requirements pertaining to vessel structure, design, equipment, and operation. * * * Federal uniformity in these matters is critical * * * because the absence of uniformity hinders the United States' ability to seek increased international vessel standards to better protect the environment." H.R. Conf. Rep. No. 104-854 (1996), *reprinted in* Intertanko Pet. App. at 268a.

See also U.S. Pet. at 14 & 27–28 (noting the grave impact of the Ninth Circuit's decision on the United States' ability to negotiate and achieve results in the international maritime community).

In the end, if the United States' role in the IMO is undermined by the ability of states and municipalities to go their own way, maritime safety and environmental protection around the world may suffer.

C. State Co-Regulation Could Seriously Burden Foreign Commerce.

Permitting the several states and their political subdivisions directly to regulate the operation and crew competence of foreign vessels and the qualification and training of foreign seafarers could create a tremendous burden upon the maritime industry and international commerce. See *American Dredging Co.* v. *Miller*, 510 U.S. 443, 466–67 (1994) ("'The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. * * * [T]he Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control.'") (Kennedy, *J.*, dissenting, quoting *Washington* v. *W.C. Dawson & Co.*, 264 U.S. 219, 228 (1924)). Vessel owners would have to comply not only with international and United States' standards, but with the separate, higher, and perhaps conflicting standards of all twenty-three coastal states and their political subdivisions. This would impose a substantial operational burden upon shipping companies and would ultimately redound to the disadvantage of the public.[33]

D. Summary.

If the word "requirements" did not appear in § 1018, it would have been impossible for the Ninth Circuit to have ruled as it did. It seems to us equally impossible, based on that one word alone, and in the absence of *any* supporting legislative history, to conclude that Congress intended thereby to reallocate federal/state powers over maritime safety and environmental protection, invite treaty violations, and damage the standing of the United States in the international maritime community. The numerous indicia of congressional intent mentioned above (see pp. 4–6, *supra*), along with what we have just demonstrated would be the grave

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[33] The Court of Appeals erroneously focused solely on the purported cost of complying with the Washington regulations at issue, see U.S. Pet. App. at 33a, without considering that its decision would also subject the international shipping industry to the costs of every other independent regulation that one of the states within its jurisdiction might enact.

consequences of an alternative reading, show that the proper interpretation of "requirements" in § 1018 is limited to financial responsibility requirements, not vessel operating and crew competence requirements.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
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THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), *ET AL.*,
Petitioners,

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, *ET AL.*,
Respondents

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN WATERWAYS OPERATORS IN SUPPORT OF PETITIONERS

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This brief is filed by the American Waterways Operators (AWO) as *amicus curiae* in support of the position of Petitioners International Association of Independent Tanker Owners (Intertanko) and the United States of America (United States).[1] AWO submits this brief with the written consent of all parties, which accompany this brief. *See* Sup. Ct. R. 37(3)(a).

I. INTERESTS OF *AMICUS CURIAE* AMERICAN WATERWAYS OPERATORS

The AWO is the national association representing the inland and coastal tugboat, towboat and barge industry in the United States. AWO's 375 member companies include bulk commodities and oil transporters, ship docking and harbor services operators, fueling, bunkering, and lightering services operators and shipyards. For over fifty-five years, AWO has worked to promote a better understanding of the unique nature of the domestic waterborne transportation industry and its safe and environmentally sound contribution to the U.S. economy.

A. The AWO represents a vital and responsible segment of the U.S. transportation industry.

The U.S. barge and towing industry is a diverse and vital segment of America's interstate transportation system. Barges and towing vessels make nearly one million voyages annually from over 2,000 bulk cargo docks and terminals along America's inland and coastal waterways. The industry employs more than 33,000 people aboard 5,200 tugs and towboats and more than 30,000 barges, including tank barges which transport oil. The barge and towing industry contributes more than $5 billion a year to the nation's economy. With operations along our nation's 25,194 miles of inland and coastal waterways, including the Atlantic, Pacific, and Gulf coasts, the tugboat, towboat and barge industry is diverse in terms of geographic areas served, the types of vessels operated,

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[1] Counsel for *amicus curiae* AWO authored this brief in its entirety. No person or entity other than AWO provided monetary support for the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

the range of cargoes carried, and the skills necessary to perform its many tasks.

Tug and barge transportation provides America's shippers with a highly cost-efficient and reliable means of moving the raw materials that fuel the nation's economy. Indeed, barges move fifteen percent of our nation's freight for less than two percent of the nation's total freight bill. The economic efficiency of barge transportation is matched by its energy efficiency. In fact, barging is America's most energy efficient mode of surface transportation. One gallon of fuel will move a ton of cargo more than 500 miles by tug and barge.

The U.S. tug and barge industry is committed to providing its customers with transportation services that are not only efficient, reliable, and cost-effective, but as safe and environmentally sound as possible. In recent years, the industry has worked closely with the U.S. Coast Guard to upgrade regulatory standards in such key areas as towing vessel operator qualifications and navigation equipment on towing vessels. That commitment is also demonstrated by industry-driven safety initiatives like the AWO "Responsible Carrier Program," a code of safe practices for tug and barge companies, and the "Coast Guard-AWO Safety Partnership," which brings the barge and towing industry together with government to solve marine safety and environmental protection problems.

B. The U.S. tug and barge industry is subject to a pervasive scheme of federal regulation and is therefore deeply concerned over this threat to national uniformity.

As commercial vessels operating under U.S. flag, AWO-member tugboats, towboats and barges are subject to a vast array of federal statutes and regulations that govern the construction, design, equipment and manning (CDEM) of the vessels, as well as operator license qualifications, training and watchkeeping. *See, e.g.*, 46 U.S.C. ch. 37 (tank barge CDEM requirements); 46 C.F.R. pts. 25-26 (uninspected vessel equipment and operations

requirements); 46 C.F.R. pts. 30-40 (tank vessel operations requirements); 33 C.F.R. pts. 155-156 (tank barge oil transfer requirements); 46 U.S.C. ch. 41 (towing vessel safety equipment requirements); 46 U.S.C. § 8104 (towing vessel watches); 46 U.S.C. § 8904 and 46 C.F.R. § 15.610 (towing vessel manning standards); 33 C.F.R. § 164.72 (towing vessel navigation equipment requirements). The Coast Guard's detailed rules for crew drug and alcohol testing apply to tugboat and towboat crews. *See* 46 C.F.R. § 4.06 and pt. 15. Federal regulations also prescribe rules governing methods for towing barges. *See* 33 C.F.R. pt. 163. Standards for tankermen responsible for oil transfers to and from tank barges are set by federal law. *See* 46 U.S.C. §§ 7317 and 8703; 46 C.F.R. pt. 13. It is also significant that tugs towing tank barges in coastal waters beyond the U.S. boundary line are subject to the standards prescribed by the International Convention on Standards for Training, Certification and Watchkeeping for Seafarers (STCW Convention). *See* 46 C.F.R. § 15.1101. The STCW standards incorporated by reference into Title 46 of the C.F.R. prescribe requirements for crew training and set limits on crew watch and rest periods. *See* 46 C.F.R. §§ 15.1109 and 15.1111.

Even after it enacted the Oil Pollution Act of 1990 (OPA 90),[2] upon which the Ninth Circuit relied so heavily in upholding the Washington tanker regulations, Congress continued to add to the federal scheme of regulation for the tug and barge industry. Title IX of the Coast Guard Authorization Act of 1996 (titled "Towing Vessel Safety")[3] and Section 311 of the Coast Guard Authorization Act of 1998 (titled "Petroleum Transportation")[4] both target the tug and tank barge industry for additional regulation. The 1998 Act specifically addresses tug and tank barge operations in the waters of the north Atlantic states. In none of the sections cited in the 1996 and 1998 Acts did Congress insert a "savings" clause

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[2] Pub. L. No. 101-380, 104 Stat. 484 (1990).

[3] Pub. L. No. 104-324, tit. IX, 110 Stat. 3901 (1996), codified at 46 U.S.C. §§ 3719 and 4102(f).

[4] Pub. L. No. 105-384, § 311, 112 Stat. 3411 (1998).

authorizing state regulatory authority over the tug and barge subjects addressed by the federal act.

It can fairly be said that the activities of the U.S. tank barge industry may occur "only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands." *See City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 634 (1973) (quoting from *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944)) (finding an implied intent to preempt state law under such circumstances); *see also Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 614 (1991) (suggesting that such a regime implies field preemption). The prospects of a new array of overlapping state and local requirements under the Ninth Circuit's holding are of great concern to AWO and its members.

C. The Ninth Circuit's ruling fundamentally alters the maritime regulatory regime in the United States.

The Ninth Circuit's ruling under review will have consequences that extend far beyond the State of Washington or the parties to this particular case. To see how the decision will affect the tug and barge industry in particular, it is important to understand that the federal definition of a "tank vessel" includes the tank *barges* owned and operated by many of AWO's members. *See* 46 U.S.C. § 2101(39). State laws that prescribe standards that are different from or otherwise overlap with the federal regime for tank barges and the tugs that tow them will destroy the uniformity so vital to AWO's members in their interstate transportation function.

It is no overstatement to say that the decision to uphold "overlapping" state regulations applicable to vessels engaged in interstate commerce has the potential to fundamentally alter the entire regulatory regime for the tug and barge industry in the United States. The Ninth Circuit ruling, if allowed to stand, might be used to determine the validity of a parallel set of Washington state Best Achievable Protection ("BAP") regulations for tank barges and the tugs that tow them. *See infra* para. IV.E.3. The

Ninth Circuit's narrow reading of this Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), might also be employed to validate laws enacted by the State of Rhode Island that call for the phase-out of single-hull tank vessels in state waters well before the time prescribed by Congress in OPA 90. *See infra* para. IV.E.1.

II. QUESTIONS PRESENTED FOR REVIEW OF CONCERN TO *AMICUS CURIAE* AMERICAN WATERWAYS OPERATORS

The questions presented in Intertanko's petition No. 98-1706 and the United States' petition No. 98-1701 of principal concern to the AWO are:

> Whether federal statutes, regulations and international treaty commitments of the United States that prescribe comprehensive standards for tank vessel operations, personnel qualifications, and manning expressly or impliedly preempt attempts by an agency of the state of Washington to enforce regulations that impose different standards and requirements governing the same subject matters aboard the same tank vessels.
>
> Whether regulations adopted by the State of Washington governing staffing[5] and operation of ocean-going oil tankers engaged in coastal and international commerce are preempted to the extent that they conflict with international obligations of the United States and Coast Guard regulations for such tankers promulgated pursuant to federal statutes and international conventions and agreements.

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[5] The term more commonly used, particularly in international law and in federal statutes and regulations, is "manning." *See, e.g.*, 46 U.S.C. ch. 81.

With respect to the second question, AWO and its members are particularly concerned about the preemptive effect of Coast Guard regulations applicable to oil tankers and tank barges engaged in coastal and inland interstate commerce and the role those regulations play in promoting uniformity.

III. SUMMARY OF ARGUMENT

The Ninth Circuit's decision reveals an elemental misunderstanding of this Court's holding in *Ray* regarding field preemption of the subjects covered by Title II of the Ports and Waterways Safety Act (PWSA) and implied preemption by regulations prescribed under authority of Title I of the PWSA. The circuit court grouped such disparate subjects as mariner qualifications, licensing, training, watchstanding practices and English language competency, along with drug and alcohol testing and navigation practices, and labeled them *operating* requirements in the same sense that the Court in *Ray* used that term when it upheld the state's escort tug requirements. In doing so, the Ninth Circuit overlooked the fact that the Court in *Ray* was referring to operating requirements adapted to the "peculiarities" of "local waters." In effect, the Ninth Circuit decision reflects an erroneous belief that under the PWSA, as construed by this Court in *Ray*, the State of Washington may determine that *all* of the coastal and inland waters of the state may be deemed to fall within the "local peculiarities" exception to uniform national rules under the PWSA. At the same time, the court's decision ignores the preemptive effect of regulations promulgated under authority of Title I of the PWSA.

In addition, the circuit court's conclusion that OPA 90 Section 1018 somehow stripped the Coast Guard of its longstanding authority under the PWSA and other statutes to prescribe regulations that preempt state or local law is inconsistent with this Court's decisions on agency preemption. The court's construction of Section 1018 of OPA 90 as a source of new authority for the states to embark on a regulatory program for tank vessel safety and vessel-source pollution prevention is contrary to the text and structure of OPA 90, the Act's legislative history and prior cases

construing virtually identical language in other federal pollution statutes. Finally, the circuit court erred in concluding that only Congress' oil spill prevention purpose in OPA 90 was relevant to the court's conflict preemption analysis, enabling the court to ignore other important congressional and agency purposes that would have been inconsistent with the court's decision. By selectively including and excluding congressional and agency purposes and objectives, the circuit court's decision violates the basic teachings of this Court that congressional intent is the ultimate touchstone of any preemption analysis.

IV. ARGUMENT

A. The Ninth Circuit decision reflects an elemental misunderstanding of the holding and reasoning of *Ray* on the preemptive effect of the PWSA.

The Ninth Circuit acknowledged the continued vitality of this Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), and the pivotal role of that decision in resolving the instant case. Given the OPA 90 Conference Committee statement that nothing in OPA 90 was intended to disturb this Court's decision in *Ray*, the circuit court could hardly conclude otherwise. *See* H.R. Conf. Rep. No. 101-653, at 122 (1990). However, the circuit court misapplied this Court's holding and reasoning in *Ray*, particularly *Ray*'s painstaking approach to classifying vessel *operating* requirements, and the Court's conclusion on the preemptive effect of Coast Guard regulations promulgated under Title I of the PWSA.

1. Limits on state regulation of federally licensed or inspected vessels.

The Court's decision in *Ray* followed a line of cases stretching back to 1824, in which the Court carefully defined the limits of state regulatory authority over vessels holding federal licenses or certificates of inspection that authorize the vessel to engage in a particular commercial trade on the navigable waters of the United States. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (striking down, on preemption grounds, New York ban on

steamships). The evolution of what the Court has labeled the "negative implications" of its decision in *Gibbons* was examined by the Court in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 277 and 279 (1977). When the only federal laws raised in a preemption challenge are the federal documentation and licensing statutes, the Court has held that mere possession of a federal license to engage in a commercial trade or activity does not immunize the vessel from all state and local regulation. *See, e.g., Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444-45 (1960) (upholding municipal smoke abatement ordinance). On the contrary, the Court has held that the states may enforce against such vessels reasonable, nondiscriminatory conservation and environmental regulations "otherwise within their police power." *Douglas*, 431 U.S. at 277.

The courts' Article VI preemption analysis does not, however, end with examination of federal documentation laws in cases where other federal laws, including treaties, federal statutes and regulations, are implicated. For example, even in *Huron* the Court declined to reach the question whether the city's vessel *inspection* ordinance was preempted by federal inspection laws, after determining there was no evidence that the city had attempted to enforce its inspection ordinance. *Huron*, 362 U.S. at 442 n.1.

This Court's decision in *Ray* set forth a "no-overlap" rule, which qualifies the states' authority to impose conservation and environmental regulations otherwise within their police powers. The Court has long treated *interstitial* state laws intended to fill gaps in the federal maritime regulatory scheme quite differently from state laws that *overlap* the federal scheme, prescribing state-specific regulations that are stricter than or otherwise different from federal standards. In both *Kelly v. State of Washington*, 302 U.S. 1 (1937), and *Huron*, the Court upheld the challenged state or local regulation only after finding that the local laws were interstitial. *See, Kelly*, 302 U.S. at 8; *Huron*, 352 U.S. at 445. After examining these cases and others, the Court in *Ray* articulated the "no-overlap" rule. *Ray*, 435 U.S. at 164-65. The

Court recognized that such overlapping state laws reflected an impermissible substitution of judgment. *Id.* at 165.

2. *Ray v. Atlantic Richfield Co.* and the new Ports and Waterways Safety Act.

In *Ray*, the Court addressed the preemptive effect of a number of familiar federal statutes and regulations. The Court applied preemption and non-preemption clauses in federal pilotage laws to Washington's pilotage requirements, upholding state pilotage requirements for vessels engaged in the foreign trade and invalidating those applicable to vessels in the coastwise trade (i.e., between two U.S. ports). *Id.* at 159-60. The Court also rejected the state's argument that either the Clean Water Act or the Coastal Zone Management Act provided authority for states to regulate oil tankers. *Id.* at 178 n.28.

Most of the Court's analysis in *Ray*, however, focused on the PWSA,[6] the centerpiece of the federal vessel safety and pollution prevention regime.[7] Throughout the opinion in *Ray*, the Court distinguished between Congress' intent as to the preemptive effect of Title I and Title II of the PWSA. The Court's conclusions regarding the preemptive reach of the PWSA can be summarized as follows:

(1) The "statutory structure" of Title II of the PWSA reveals that Congress intended that Title II would fully occupy the field of tank vessel construction and design requirements. *Ray*, 435 U.S. at 162-63. Although Title II also addresses other tanker regulatory subjects, including tank vessel operation, equipping, personnel qualification and manning (including duties, qualifications and training of the officers and crews), at the time of the *Ray* decision, Washington did not purport to regulate those other

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[6] Pub. L. No. 92-340, 86 Stat. 424 (1972).

[7] The Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471 (1978) (PTSA), had not been enacted at the time of the Court's decision.

subjects, so the question of preemption of those subjects was not before the Court.[8]

(2) In contrast to Title II of the Act, which *requires* the Secretary of Transportation (Secretary) to promulgate tanker regulations, Title I provides the Secretary with *discretion* to promulgate regulations, and therefore does not evince an intent that federal law would occupy the field for subjects falling within that Title. When, however, the Secretary exercised the authority conferred by Title I, the Court reasoned (in *dictum*) that the Secretary's regulations, together with the preemptive effect of 33 U.S.C. § 1222(b)[9] (discussed below), would preempt state laws on the same subject. *Id.* at 171-72.

(3) By saving, in Title I of the PWSA, state authority to prescribe "higher equipment or safety standards" only as to *structures* (33 U.S.C. § 1222(b), now at § 1225(b)), Congress impliedly preempted the states from imposing on *vessels* higher equipment or safety standards than those prescribed by the Secretary under his or her Title I authority. *See Ray*, 435 U.S. at 171, 174.

3. The Ninth Circuit's decision erroneously validated overlapping state tanker regulations.

The Ninth Circuit upheld, against a broad-based preemption challenge, overlapping Washington state regulations applicable to vessel operations and crew member qualifications, training, watchstanding, English language competency and drug and alcohol

[8] The "statutory structure" of Title II that informed the Court's decision in *Ray* extends to each of the subjects for which the Secretary of Transportation was directed by Congress to prescribe regulations. *See* 46 U.S.C. § 3703(a).

[9] At the time of the Court's decision in *Ray*, the state law saving clause for structures was codified in 33 U.S.C. § 1222(b). It was subsequently re-codified in 33 U.S.C. § 1225(b).

testing, despite the established "no overlap" rule articulated by this Court in *Huron* and *Ray*. The circuit court's decision is premised on two errors in its application of *Ray*. First, the court's decision fails to recognize that many of the overlapping Washington tanker regulations address subjects within the field preempted by Title II of the PWSA. The circuit court's error was compounded by its misunderstanding of this Court's distinction in *Ray* regarding vessel operating requirements adapted to the "peculiarities" of particular local waters, and those for which Congress intended uniform national rules. Second, the court failed to recognize that under *Ray*'s reasoning, once the Coast Guard promulgates rules under its Title I authority, the states are preempted from prescribing higher safety or equipment standards for vessels.

The Ninth Circuit's decision to classify subjects as diverse as mariner licensing, training, watchstanding, drug and alcohol testing and English language competency as operational requirements — as that label was employed by the Court in *Ray* — reveals a fundamental misunderstanding of both the PWSA and the Court's decision in *Ray*. Both Title I and Title II of the PWSA address vessel operations. *See* 46 U.S.C. § 3703 and 33 U.S.C. § 1223. The Court in *Ray* was careful to distinguish the two provisions. The Ninth Circuit in *Intertanko* was not. Title II of the PWSA requires the Secretary to promulgate regulations prescribing tank vessel CDEM standards, crew qualification standards, and ballasting and operating requirements. *See* 46 U.S.C. § 3703(a). Under the Court's decision in *Ray*, Title II fully occupies the field of tanker design and construction. *Ray*, 435 U.S. at 163-64. The Court's decision was based on the structure of Title II and the importance of the fact that Congress had required the Secretary to issue regulations to implement that title. *Id.* It follows from the Court's reasoning that the other subjects in Title II for which the Secretary was required to promulgate regulations, including tank vessel operations, occupy the field as well.

As the Court in *Ray* recognized, the operating requirements envisioned by Congress in Title I are rules and procedures addressed to the peculiarities of local waters, such as the narrow

and relatively shallow waters of Rosario Strait in upper Puget Sound. *See* 435 U.S. at 174-75 and n.26. The Court's analysis of whether the state's ban on tankers of more than 125,000 deadweight tons in *Ray* fell within the Title II (field preemption) or Title I (preempted only after the Secretary has promulgated rules) rule turned on whether the state rule represented a contrary state judgment on safety and environmental protection or was instead a response to a unique and localized condition. The Court explained that:

> [i]f Washington's exclusion of large tankers from Puget Sound is in reality based on water depth in Puget Sound or on other local peculiarities, the Tanker Law in this respect would appear to be within the scope of Title I, in which event also state and local law would represent contrary judgments, and the state limitation would have to give way.

Id. at 175 (*dictum*). When the distinction was pointed out to the Ninth Circuit in *Intertanko*, the panel's response was that "the BAP Regulations are designed for the same 'local waters,' namely Puget Sound, as was the Washington Tanker Law contested in *Ray*." *See Intertanko v. Locke*, 148 F.3d 1053, 1065 (9th Cir. 1998). On the contrary, the Court's discussion in *Ray* focused on the waters of a particular strait, where Washington sought to limit the passage of large tankers. The BAP regulations, by contrast, apply to vessels throughout state waters[10], including coastal waters out to three miles, and therefore constitute the kind of substitution of judgment on safety and environmental protection the Court in *Ray* analyzed under Title II of the Act. *Cf. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 213 (1983) (reasoning that "a state judgment that nuclear power is not safe enough to be further developed would conflict directly

[10] *See* Wash. Rev. Code § 88.46.080 (prohibiting tank vessels from operating in state waters unless they have an approved prevention plan that complies with the BAP Regulations). State waters are defined in Article XXIV, Section 1 of the Washington State Constitution.

with the countervailing judgment of the NRC") (*dictum*). Moreover, the court simply ignored the fact that, even if the Washington regulations were a response to unique, local conditions, stricter state safety or equipment standards would be preempted by the Coast Guard's regulations under Title I of the Act.

B. The Ninth Circuit's construction of OPA 90 Section 1018 is inconsistent with the structure and legislative history of the Act and with prior cases construing virtually identical saving clauses.

Notwithstanding this Court's earlier decisions against overlapping state laws, the Court of Appeals upheld Washington State regulations that overlap federal treaties, statutes and regulations. The circuit court's decision relies almost entirely on its interpretation of Congress' intent in Section 1018 of OPA 90. As Judge Graber details in her dissent from the Ninth Circuit's refusal to grant a rehearing *en banc*, the panel's construction of Section 1018 is flawed. *See Intertanko v. Locke*, 159 F.3d 1220, 1221-25 (9th Cir. 1999) (Graber, J., dissenting from suggestion for *rehearing en banc*).

Congress has long provided for concurrent state authority to prescribe laws imposing liability and compensation requirements and to assess additional penalties for discharges of oil or hazardous substances in state waters.[11] This Court upheld state laws

[11] *See* Clean Water Act, 33 U.S.C. § 1321(o)(2) (CWA) (providing that "[n]othing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State"); Comprehensive Response, Compensation and Liability Act, 42 U.S.C. § 9614(a) (CERCLA) (providing that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State"); Deepwater Port Act of 1972, 33 U.S.C. § 1517(k) (DWPA) (providing that "[t]his section shall not be interpreted to preempt the field of liability or to preclude any State from imposing additional requirements or liability for any discharge of oil from a deepwater port or a vessel within any safety zone").

prescribing liability for oil pollution removal costs and damages in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). The Court's decision rested primarily on the state law saving clause in the Water Quality Improvement Act of 1970, 84 Stat. 91 (1970) (WQIA) (a predecessor to the CWA), which was similar in nearly all respect to Section 1018 of OPA 90.[12] Nothing in the *Askew* decision, however, supports a conclusion that Congress intends, when it preserves the authority of states to impose a *requirement or liability with respect to the discharge of oil*, to grant new authority to the states to regulate merchant vessel safety and vessel-source pollution prevention. In fact, the Court in *Askew* left open the question whether the WQIA saving clause would validate state laws prescribing spill *equipment* requirements. *Askew*, 411 U.S. at 336-37 (reasoning that "[r]esolution of this question, as well as the question whether such regulations will conflict with Coast Guard regulations . . . should await a concrete dispute . . .").

The touchstone in all preemption analyses is the purpose or intent of Congress. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Against the 150 year long backdrop of Supreme Court decisions stretching from *Gibbons* to *Huron* and *Ray*, Congress enacted OPA 90. Congress clearly contemplated that *some* state competency over water pollution subjects would be preserved. The question presented to the Court by this appeal is whether Congress intended, by the saving clause in Section 1018, to amend the existing tanker regulatory regime, and to permit the states to regulate subjects previously within the exclusive domain of federal law. Plainly, it did not. Congress selected a familiar and narrowly drawn saving clause that saved state authority only over pollution liability and compensation issues.

How did Congress make known its intent regarding the role of state law under OPA 90? First, by the text: Congress crafted a

[12] Section 1161(o) of the WQIA, as quoted by the Court, provided that "[n]othing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within the state." *See Askew*, 411 U.S. at 329.

state law saving clause that incorporated language virtually identical to the language it had earlier used in the WQIA (analyzed in *Askew*), CERCLA and the DWPA.[13] Second, through the structure: it placed that saving clause in Title I of OPA 90, which addresses "liability and compensation." Third, by contemporaneous statements in the most persuasive source of legislative intent: the Conferees made clear in the Conference Report — Congress' final statement on the meaning and intent of OPA 90 — that nothing in OPA 90 was intended to disturb this Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). *See* H.R. Conf. Rep. No. 101-653, at 122 (1990).

C. The Court's conclusion that OPA 90 Section 1018 strips the Coast Guard of its delegated authority to prescribe preemptive regulations is contrary to the text and legislative history of OPA 90 and this Court's decisions.

The Ninth Circuit decision would strip the Coast Guard of the authority Congress conferred on the agency to preempt state regulation of a subject matter, whether that authority derives from OPA 90 or another act or treaty. *See Intertanko*, 148 F.3d at 1067-68. The court's ruling is inconsistent with this Court's decisions on the preemptive effect of agency regulations and on the deference to be accorded to an agency's reasonable construction of an ambiguous statute.[14] Moreover, the decision is inconsistent with this Court's conclusions regarding field preemption under Title II of the PWSA and the preemptive effect of Coast Guard regulations promulgated under Title I of the PWSA. Because Title II of the PWSA completely occupies the field for the subjects listed, the preemptive effect of Coast Guard regulations under Title II is irrelevant; preemption follows directly from the PWSA itself. The Court in *Ray* also recognized that Coast Guard regulations

[13] *See supra* note 11 (quoting saving clauses from CWA, CERCLA and DWPA).

[14] *See United States v. Shimer*, 367 U.S. 374 (1961); *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982); *Hillsborough County, Florida v. Automated Medical Labs*, 471 U.S. 707 (1985); *City of New York v. FCC*, 486 U.S. 57 (1988); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

promulgated under authority of Title I, or a decision that no regulatory action was appropriate, would preempt state laws on that subject. *Ray*, 435 U.S. at 174-75 (*dictum*). The Ninth Circuit decision also ignores the fact that Congress has itself acknowledged the "long history of preemption in maritime safety matters" founded on "the need for uniformity applicable to vessels moving in interstate commerce."[15]

D. The circuit court's "single-purpose" approach to conflict preemption analysis erroneously omits other vital congressional and agency purposes and objectives.

The Ninth Circuit concluded that:

> In the field of tanker regulation, the overarching purposes of Congress are best revealed by OPA 90. As the most recent federal statute in the field, OPA 90 reveals "the *full* purposes and objectives of Congress" ... better than the PWSA, the PTSA, or the Tank Vessel Act, all of which OPA 90 was designed to complement.

Intertanko, 148 F.3d at 1062 (citations omitted). The Ninth Circuit's decision to focus on only one act (OPA 90) — indeed, on only one purpose (prevention) in that single act — as the "best" source of congressional intent in its conflict preemption analysis will result in the exclusion of a number of purposes and objectives underlying OPA 90 and other statutes, treaties and regulations. Although the approach may simplify the court's task, it fails to satisfy the court's obligation under an Article VI review to give effect to the supremacy of federal law, in accordance with Congress' intent. The following examples highlight congressional or agency purposes and objectives that likely will be omitted under the Ninth Circuit's approach.

---

[15] Sen. Rep. No. 92-248, at 20-21 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1341.

In Section 4115 of OPA 90, Congress prescribed a twenty-five year phase-out period for single-hull tanker vessels. *See* 46 U.S.C. § 3703a (codifying OPA 90 Section 4115). If Congress had in mind the single "prevention" purpose attributed to it by the Ninth Circuit, and an intent that the goal be pursued equally by the states without concern for federal preemption, Congress would likely not have taken the approach evident in Section 4115. On the contrary, the legislative history of OPA 90 reveals that Congress had in mind a number of purposes, in addition to its spill prevention goal, when it prepared the elaborate phase-out schedule. Those other purposes included the needs and capabilities of the transporters themselves, as well as the shipyards that will be called upon to build the new double-hull tankers and tank barges. *See*, H.R. Conf. Rep. No. 101-653, at 93-94 (1990) (describing Congress' concerns in enacting OPA 90 for the need to balance the goal of prompt environmental protection against other considerations).

A federal purpose to bring uniformity to the mariner professional licensing and training standards is also evident in the Coast Guard's regulations implementing recent amendments to the International Convention on the Standards for Training, Certification and Watchkeeping for Seafarers (1978, as amended in 1995). *See* 62 Fed. Reg. 34,506 (1997) (concluding in its rulemaking that one of the purposes of the 1995 amendments was to prescribe "clear, uniform standards of competence" for mariners). There is no evidence the Ninth Circuit considered the federal goal of uniformity when it upheld state laws prescribing more stringent mariner licensing, training and English competency standards.

The Coast Guard is undertaking a revision of the federal regulations applicable to U.S. flag vessels with the purpose of "harmonizing" these regulations with international standards. *See* 61 Fed. Reg. 58,804 (1996); 62 Fed. Reg. 1622, 1624 (1997). AWO's members support the Coast Guard's purpose and objective of "leveling the playing field" for U.S. flag vessel operators, to enable them to compete on fair terms with foreign vessels. At the

same time, AWO's members recognize that any harmony between federal and international standards will be meaningless if state and local governments are free to frustrate the federal objectives by prescribing their own laws on the same subject.

AWO's members are also deeply concerned over the protest by the Government of Canada to Washington's decision to prescribe laws applicable to vessels on international voyages to Canadian ports in the province of British Columbia, that must necessarily transit through Washington State waters in northern Puget Sound. Canada's protest declares that the action directly violates an international agreement between the two nations.[16] Many of the vessels operated by AWO's members transit the Canadian waters of the Inside Passage between Washington State and Alaska. If the state's violations of the international agreement resulted in a loss of reciprocity benefits for U.S. flag vessels operating in Canadian waters, AWO's members might be forced to either comply with additional Canadian requirements or travel the exposed ocean route between Washington and Alaska. This result would cause severe financial consequences for members of the barge and towing industry.

E. The Ninth Circuit's decision poses additional grave consequences for AWO's members.

Beyond the AWO concerns raised above, the consequences of the Ninth Circuit's decision to AWO's members are best demonstrated by three examples.

1. The Ninth Circuit rule might be used to validate tank vessel design requirements otherwise preempted under *Ray*.

Because the federal requirements respecting the phase-out of single-hull tank vessels appear in OPA 90 (Section 4115 of Title IV), under the Ninth Circuit's reasoning, the saving clause in Title I of OPA 90 (Section 1018) could be construed to validate stricter

[16] Cooperative Vessel Traffic Management System for the Juan de Fuca Region, Dec. 19, 1979 (U.S.-Canada), T.I.A.S. 9706, 32 U.S.T. 377.

state laws on that same subject. Moreover, because spill *prevention* is the only relevant purpose the Ninth Circuit's rule would consider in a conflict preemption analysis under OPA 90, Congress' purposes in delaying implementation, to provide the industry with adequate time to meet the new double-hull requirement, would be ignored. The question presented is not merely academic for AWO's members. The State of Rhode Island has enacted laws banning single-hull tankers beginning in 2001 — up to fourteen years earlier than the date Congress selected in OPA 90.[17] As a tank vessel design and construction rule, the Rhode Island standard encroaches upon the field exclusively occupied by Title II of the PWSA under this Court's decision in *Ray*. Even though nothing in OPA 90 or its legislative history indicates that Congress intended that Section 1018 would alter the Court's finding of Title II field preemption, the Ninth Circuit's decision might be interpreted to hold otherwise.

Rhode Island's decision to accelerate regulatory implementation dates over those established by federal law raises important questions that are likely to recur regarding the federal purposes in prescribing a future implementation date to provide industry with adequate time to comply with the new standards. Although some have argued that the state's accelerated compliance date "complements" the federal safety or pollution prevention goal, such reasoning focuses on only one objective, while ignoring the objectives that persuaded Congress to establish a longer implementation schedule. The effect of Rhode Island's accelerated phase-out schedule on AWO's members who transport oil in the northeastern United States could be devastating, forcing the retirement of tank barges more than a decade before the federal deadline.

[17] *Compare* R.I. Gen. Laws § 46-12.6-10 ("Effective Jan. 1, 2001, no tank vessel shall transport oil or hazardous material over the waters of this state in any conditions unless the tank vessel (i) has a double hull or (ii) is accompanied by an escort towing vessel. . . .") *with* 46 U.S.C. § 3703a (phasing out single-hull tank vessels over period ending 2015). The Rhode Island escort tug rule likely also overlaps with 46 U.S.C. § 3719 (interim measures for single hull tank barges).

2. The Ninth Circuit's decision fails to account for preemption by subsequent legislation.

In the almost decade-long period since OPA 90 was enacted, Congress has continued to legislate new requirements for the tug and barge industry. Both the Coast Guard Authorization Act of 1996[18] and the Coast Guard Authorization Act of 1998[19] contain sections requiring the Coast Guard to promulgate regulations applicable to tugs and tank barges. In sections of the 1996 Act, now codified in 46 U.S.C. §§ 3719 and 4102(f), Congress prescribed a specific regime for addressing the risk of oil spills from single-hull tank barges. The Act requires the Secretary, in consultation with the Towing Safety Advisory Committee, to prescribe regulations for single-hull tank barges and the tugs towing them that operate in ocean or coastal waters. Coast Guard Authorization Act of 1996, § 901(a). The Secretary's proposed regulations were published in 62 Fed. Reg. 52,057 (1997). In the proposed regulations, the Coast Guard has indicated that state regulations on the subjects addressed by the federal regulations (including some of the Rhode Island requirements) would likely be preempted by the forthcoming federal regulations. *See* 62 Fed. Reg. at 52,066. Under the Ninth Circuit's rule, however, the Coast Guard regulations — even though based on a statute enacted after OPA 90 that contains no state law saving clause — may not preempt state regulations. Moreover, contrary to established rules of statutory construction, the circuit court apparently would give no deference to the agency's construction of the statutes involved. *See Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984). The result for AWO's members would be to destroy any hope of the uniformity so vital to interstate transportation.

[18] *See supra* note 3.

[19] *See supra* note 4.

3. Many of the Washington BAP standards applicable to tank barges might be validated by the Ninth Circuit rule even though preempted under *Ray*.

The rule adopted by this Court in the *Intertanko* challenge to the Washington tank ship regulations will likely provide the legal basis for determining the validity of Washington's BAP regulations for tank barges. *See* Wash. Admin. Code ch. 317-21, pt. 4. Indeed, the questions presented by this review do not distinguish between the regulations applicable to tank ships and those that apply specifically to tank barges. An examination of several selected Washington regulations applicable specifically to tank barges and the tugs that tow them reveals the extent of the state's ambition and the overlap between the state scheme and the federal regime.[20]

Federal law requires tugs over five net tons and tank barges to be documented and carry appropriate federal endorsements for the trade in which they are engaged. *See* 46 U.S.C. §§ 12102, 12106(b) and 12110. Tank barges are also subject to federal inspection. *See* 46 U.S.C. § 3710. Accordingly, such tugs and barges fall within the Court's decisions in *Gibbons*, *Douglas*, *Huron* and *Ray*. As summarized by the Court in *Ray*, those cases establish a "no overlap" rule. *Ray*, 435 U.S. at 164. It seems clear that the Washington "technology" requirements applicable to tank barges in Wash. Admin. Code § 317-21-345 constitute construction, design or equipment requirements and are therefore preempted under the PWSA Title II field preemption conclusion in *Ray*. Additionally, those technology regulations overlap with, and are preempted by, federal regulations in 33 C.F.R. § 164.72.

Washington's tank barge standards also require, *inter alia*, that tugs towing tank barges comply with state-specific watch procedures and a state-imposed minimum watch complement,

[20] The Washington State ambition is clear in Wash. Rev. Code § 88.46.150, which invites recommendations for the state to "adopt standards for tow [boat] equipment and its maintenance, operation and inspection."

Wash. Admin Code § 317-21-300, and manning requirements, *id.* § 317-21-315. The latter regulation requires that tugs towing tank barges that operate in coastal waters carry three licensed operators or tow-vessel operators, *id.* § 317-21-315(b)(2), even though federal law prescribes a system requiring two licensed operators and minimum rest periods. *See* 46 U.S.C. § 8104; 46 C.F.R. §§ 15.610 and 15.710. Under the rubric of "operating procedures," Wash. Admin Code § 317-21-305 purports to prescribe when and how tugs and their tows may cross coastal bars *en route* to or from inland waters and ports. Wash. Admin Code § 317-21-310 prescribes specific manning standards for tugs towing tank barges, even though such standards plainly overlap with federal statutes. *See* 46 U.S.C. §§ 8904 and 9102. Finally, Wash. Admin Code § 317-21-310 prescribes state-specific training requirements for tug operators that overlap with federal standards under 46 C.F.R. pt. 15.

Under *Ray*, the Washington tank barge BAP standards would not be valid to the extent they fall within the subject matter exclusively occupied by Title II of the PWSA/PTSA or the subject of the Coast Guard's regulation under Title I, or if they overlap with existing federal statutes or regulations. Under the Ninth Circuit's simplified classification scheme, however, the tank barge rules would likely be deemed *operating* rules, and therefore would be valid under that court's understanding of *Ray*. The only congressional purpose the circuit court would accredit in determining whether the Washington regulations frustrate the accomplishment of the full purposes and objectives of Congress would be the prevention purpose in OPA 90. Accordingly, any balancing of the costs and benefits or risks and utility of safety measures represented in the existing federal rules would likely be ignored. Such an approach could seriously threaten the ability of AWO's members to provide an economical interstate transportation option in the years to come.

V. CONCLUSION

The Ninth Circuit's decision permits an overlapping patchwork of federal, state and local laws that will destroy

uniformity for interstate carriers. The circuit court's decision fails to respect the supremacy of federal law prescribed by Article VI of the Constitution, as applied by this Court in *Ray v. Atlantic Richfield Co.* If it stands, the decision will have an immediate and pervasive effect on the tugboat, towboat and barge industry in the United States. The industry's ability to provide the nation with a cost-efficient and energy-efficient alternative to its interstate transportation needs will be seriously undermined by the ruling. Accordingly, AWO urges this Court to reverse the Ninth Circuit and to remand the case for a decision consistent with the holding and reasoning of the Court's decision in *Ray v. Atlantic Richfield Co.* and with Congress' true purposes in OPA 90 and the other statutes, treaties and regulations that form the Law of the Land with respect to maritime regulation.

Respectfully submitted,

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October 20, 1999

APPENDIX A

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October 12, 1999

Barbara L. Holland, Esquire
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1191 Second Avenue
Suite 1800
Seattle, WA 98101-2939

RE: ***INTERTANKO v. Gary Locke, et al.; and United States v. Gary Locke, et al. Nos. 98-1701 and 98-1706***

Dear Ms. Holland:

On behalf of INTERTANKO, I consent to the filing of the requested *amicus curiae* brief that you seek permission to file on behalf of American Waterways Operators in support of INTERTANKO and the United States.

I am sending notification to that effect to the other counsel of record involved in this matter. Please note that Rule 29.2, permitting postmarked filings to be timely filed at the Court, does not apply to this case and the briefs on the merits are due at the Clerk's Office by 3:00 PM on October 22, 1999.

Yours very truly,

C. Jonathan Benner

C. Jonathan Benner
Counsel of Record for INTERTANKO

CC: David C. Frederick, Esquire
William B. Collins, Esquire
Jeffrey Needle, Esquire

BEST AVAILABLE COPY

U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

October 15, 1999

Kristi S. Anderson
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Re: United States v. Gary Locke, Governor of Washington
No. 98-1701

International Association of Independent Tanker Owners (Intertanko) v.
v. Gary Locke, Governor of Washington, et al., No. 98-1706

Dear Ms. Anderson:

As requested in your letter of October 12, 1999, I hereby consent to the filing of a brief amicus curiae on behalf of the American Waterways Operators, Incorporated in the above-styled cases.

Sincerely,

Seth P Waxman/ls

Seth P. Waxman
Solicitor General

cc: William K. Suter, Esquire
Clerk
Supreme Court of the United States
Washington, D.C. 20543

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October 13, 1999

Kristi S. Anderson
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VIA FACSIMILE AND U.S. MAIL
206-464-0125

RE: *United States v. Gary Locke, Governor or Washington*
United States Supreme Court Cause No. 98-1701

International Association of Independent Tanker Owners (Intertanko) *v. Gary Locke, Governor of Washington, et al.*
United States Supreme Court Cause No. 98-1706

Dear Ms. Anderson:

Pursuant to your request dated October 12, 1999, Governor Gary Locke and the other state respondents in the above referenced cases consent to your filing an amicus brief on behalf of the American Waterways Operators, Inc.

Sincerely,

WILLIAM B. COLLINS
Senior Assistant Attorney General
(360) 753-6245

wro
cc: Jeffrey Needle
Jonathan Benner
Seth Waxman

Re: Request for Consent to file Amicus Curiae Brief in *Intertanko v. Locke* (No. 98-1701, September 10, 1999)

☒ As counsel for Snohomish County - James H. Krider Prosecuting Attorney we consent to the request by American Waterways Operators, Incorporated, to file an amicus curiae brief in support of Intertanko and the United States in the above-captioned case.

☐ We do not consent for the following reason: _____

Signed: October 18, 1999.

Alfred P. Gehri, WSBA 11035

Attorney(s) for James H. Krider

Re: Request for Consent to file Amicus Curiae Brief in *Intertanko v. Locke* (No. 98-1701, September 10, 1999)

☒ As counsel for Intervenors - WEC et al we consent to the request by American Waterways Operators, Incorporated, to file an amicus curiae brief in support of Intertanko and the United States in the above-captioned case.

☐ We do not consent for the following reason: _____

Signed: October 18, 1999.

Attorney(s) for
Intervenors

(22) (22)

Supreme Court, U.S.
FILED
OCT 22 1999
CLERK

No. 98-1701 & 98-1706

IN THE

Supreme Court of the United States

UNITED STATES

v.

LOCKE, GOVERNOR OF WASHINGTON, *et al.*

AND

INTERNATIONAL ASSOCIATION OF
INDEPENDENT TANKER OWNERS
(INTERTANKO)

v.

LOCKE, GOVERNOR OF WASHINGTON, *et al.*

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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U.S. Const. art. I, § 9, cl. 5	6
U.S. Const. art. I, § 9, cl. 6	6, 24
U.S. Const. art. I, § 10, cl. 1	6, 23, 24
U.S. Const. art. I, § 10, cl. 3	6, 23
U.S. Const. art. III, § 2	*passim*
U.S. Const. art. VI, § 2	6

INTERESTS OF THE *AMICI CURIAE*

The National Association of Waterfront Employers ("NAWE") is a not for profit tax-exempt trade association organized under the laws of the District of Columbia.[1] NAWE's 35 member companies are private sector stevedores and marine terminal operators operating in over 100 ports in the United States on all three coasts, the Great Lakes, Alaska, Hawaii, and the Commonwealth of Puerto Rico. Signal Mutual Indemnity Association, Ltd. ("Signal") is the largest provider of indemnity insurance for the shore-based maritime industry.

The questions accepted for review present important questions of maritime law, with ramifications beyond the maritime industry directly impacted by the State of Washington's "Best Available Protection" regulations. Should the Circuit Court's preemption analysis stand, it will adversely affect the proper resolution of other maritime issues under a number of other federal statutes enacted pursuant to the maritime jurisdiction of the United States. Among the other federal maritime statutes *Amicus* NAWE members are subject to, include the Shipping Act of 1984, as amended, 46 U.S.C. App. § 1701 *et seq.*, the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.*, the waterfront safety and port facility security provisions of the Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1225 and 1226, and the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* *Amicus* Signal insures many of the terminal/stevedoring opera-

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[1] Pursuant to Supreme Court Rule 37.3, letters of consent on behalf of all Petitioners and Respondents have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored the brief in whole or in part and no person or entity, other than the *Amici Curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

tions subject to one or more of these statutes for a large portion of the marine terminal/stevedoring industry.

The interests of *Amici* are not academic. Recently, one state port authority attempted to regulate stevedoring contracts through licensing despite the fact that stevedoring contracts fall within the federal admiralty jurisdiction. *Petition of South Carolina State Ports Authority for Declaratory Order*, 27 SRR 1137 (August 12, 1997). Under the laws of another state, private "bounty hunters" have noticed the maritime industry that its use of diesel engines for ship propulsion and for shore-side loading/unloading activities is unlawful under that state's laws. This state law is presently under court review. *Shell Oil Co. v. United States Department of Labor*, No. 97-1205 (D.C.D.C. May 28, 1997).

Amici submit that the maritime commerce provisions of the Constitution, and the statutes enacted pursuant to this authority, require a uniform and predictable federal regulatory standard, and not a standard that allows duplicitous and conflicting state maritime standards. Consequently, *Amici* have an interest in reversing the decision of the Circuit Court to the contrary.

STATEMENT OF THE CASE

At the time the Constitution was drafted, the states of the future United States were dependent on maritime commerce. Trade with other nations flowed almost exclusively over the navigable waters of the world. Even trade between the states flowed largely over our navigable waters, both inland and at sea. Not surprisingly, at the time the Constitution was drafted, the principal populations centers of the new nation were the port cities—Boston, New York City, Philadelphia, Baltimore, Charleston, etc.—that had grown around maritime commerce.

Our Founding Fathers were concerned, based on their firsthand experience under the Articles of Confederation, that the decisions of one state to regulate maritime commerce might affect the welfare of the other states:

> Advised, as they [the founding fathers] were by personal experience, of the difficulties which attended the separate exercise by the States of admiralty powers, before the confederation was formed, and afterwards from the restricted grant of judicial power in its articles, can it be supposed, in framing the constitution, when they were endeavoring to apply a remedy for those evils by getting the States to yield admiralty jurisdiction altogether to the United States, it was intended to circumscribe the larger jurisdiction existing in them to the limited cases, and those only then allowed in England to be cases of admiralty and maritime jurisdiction? * * * It is remarkable, too, that the words "all cases of admiralty and maritime jurisdiction," as they now are in the constitution, were in the first plan of government submitted to the convention, and that in all subsequent proceedings and reports they were never changed. There was but one opinion concerning the grant, and that was, the necessity to give a power to the United States to relieve them from the difficulties which had arisen from the exercise of admiralty jurisdiction by the States separately.

Waring v. Clarke, 46 (5 How.) U.S. 441, 456-457 (1847). Or as Chief Justice Marshall held: "The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824). Or as Daniel Webster noted:

> In the history of the times, it was accordingly found, that the great topic, urged on all occasions, as showing the necessity of a new and different government,

was the state of trade and commerce. To benefit and improve these, was a great object in itself; and it became greater when it was regarded as the only means of enabling the country to pay the public debt, and to do justice to those who had most effectually labored for its independence. The leading state papers of the time are full of this topic. The New-Jersey resolutions complain, that the regulation of trade was in the power of the several States, within their separate jurisdiction, in such a degree as to involve many difficulties and embarrassments; and they express an earnest opinion, that the sole and exclusive power of regulating trade with foreign States, ought to be in Congress. Mr. Witherspoon's motion in Congress, in 1781, is of the same general character; and the report of a committee of that body, in 1785, is still more emphatic. It declares that Congress ought to possess the sole and exclusive power of regulating trade, as well with foreign nations, as between the States. The resolutions of Virginia, in January, 1786, which were the immediate cause of the convention, put forth this same great object. Indeed, it is the only object stated in those resolutions. There is not another idea in the whole document. The entire purpose for which the delegates assembled at Annapolis, was to devise means for the uniform regulation of trade. They found no means, but in a general government; and they recommended a convention to accomplish that purpose. Over whatever other interests of the country this government may diffuse its benefits, and its blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the necessities of commerce; and, for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system. It would be easy to show, by reference to the discussions in the several State conventions, the prevalance of the same general topics; and if any

> one would look to the proceedings of several States, especially to those of Massachusetts and New-York, he would see, very plainly, by the recorded lists of votes, that wherever this commercial necessity was most strongly felt, there the proposed new constitution had most friends.

Gibbons, 22 U.S. at 11-13 (Webster's argument to Supreme Court).

The concern over the need for a strong central and uniform law governing maritime commerce was reflected and addressed throughout the Constitution. Many of the Constitution's clauses explicitly address the issue of maritime commerce. Other constitutional provisions implicitly address maritime commerce, for any other reading would fail to give those clauses their full force and effect. Examples are almost too numerous to list, but fall into four major categories:

First, the Constitution gave the national government the right to regulate maritime commerce. See U.S. Const. art. III, § 2 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . .") (hereinafter the "Admiralty Clause"). U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States[.]") (hereinafter the "Foreign Commerce Clause" and "Domestic Commerce Clause" respectively, collectively the "Commerce Clause"). U.S. Const. art. I, § 8, cl. 10 ("The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations[.]") U.S. Const. art. I, § 8, cl. 11 ("The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and Rules concerning Captures on Land and Water[.]"). U.S. Const. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the fore-

going Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.") (hereinafter the "Necessary and Proper Clause").

Second, the Constitution placed restrictions on the national government's maritime commerce powers. *See* The Admiralty Clause. U.S. Const. art. I, § 9, cl. 5 ("No tax or Duty shall be laid on Articles exported from any State."). U.S. Const. art. I, § 9, cl. 6 ("No Preference shall be given by any regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obligated to enter, clear, or pay Duties in another.").

Third, the Constitution placed restrictions on the maritime commerce powers of the several states. *See* The Admiralty Clause. Foreign Commerce Clause. Domestic Commerce Clause. U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . ."). U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.")

Finally, the national maritime commerce law was made the supreme law of the land. U.S. Const. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). (These constitutional clauses will be referred to collectively in this brief as the

"maritime commerce clauses.") It is against this constitutional backdrop that the Court must judge the State of Washington's Best Achievable Protection ("BAP") regulations. Sections 317-21-010 *et seq.* of the Washington Administrative Code issued pursuant to Chapter 88.46 of the Laws of the State of Washington.

The concerns of the Founding Fathers are still with us today. The United States is still dependent—if anything, more dependent—on maritime commerce. Our principal population centers are still our port cities. We are now the world's leading maritime nation with more goods flowing to and from this country than anywhere else on earth. We share land borders with but two nations—Mexico and Canada—so our trade with the rest of the world flows primarily over the world's navigable waters. We have two states—Hawaii and Alaska—plus territories and the Commonwealth of Puerto Rico that have no land connection to the other states of the United States and therefore are dependent on maritime commerce for even their domestic commerce.

Waterborne cargo contributes more than $742 billion to the U.S. gross domestic product and creates employment for more than 13 million United States citizens. Waterborne cargo consists of more than 2 billion tons of domestic and international freight and 3.3 billion barrels of imported oil that is essential to the continued health of the economy. This cargo moves through more than 1,000 harbor channels and 25,000 miles of inland, intercoastal, and coastal waterways, more than 300 ports, with more than 3,700 terminals that handle passenger and cargo movement. In addition, our maritime system transports 134 million passengers by ferry; 5 million cruise ship passengers, and involves 110,000 commercial fishing and recreational fishing vessels. As impressive as these numbers are, waterborne commerce is expected to double in the next 20 years. U.S. Department of

Transportation, *An Assessment of the U.S. Marine Transportation System, A Report to Congress,* vii-viii (Sept. 1999).

The maritime system is literally the lifeblood of the United States economy. It has flourished because of national and international uniformity. As the Department of Transportation recently noted "Each component [of the U.S. Maritime Transportation System] is a complex system within itself and is closely linked with the other components." *Id.* at vii. The same 40 foot cargo container that moves along the highways and rail lines of the United States must move over the highways and rail lines of Europe, Asia, and the rest of the world. The equipment and procedures used in the United States to load and unload that container are necessarily the same as those used in Europe, Asia and the rest of the world. The ship that brings that container to a United States port, must also meet the requirements of the ports in Europe, Asia and the rest of the world. Uniformity, is the keystone to this entire system of maritime commerce.

The same uniformity is essential to the movement of oil. The oil tanker that calls on United States ports must necessarily meet the requirements of the ports in the Middle East, Europe, Asia and the rest of the world.

Not surprisingly, maritime law is now commonly based on international treaties such as those before the Court and laws implementing those treaties. With such an integrated and complicated maritime transportation system, the unilateral regulation of one nation—let alone 50 different states—has the potential to bring the system to a grinding halt. Just as was the case over 200 years ago, the decisions of one state to regulate maritime commerce has implications for the entire nation.

If anything, we are more dependent on a uniform maritime law than we were at the time the Constitution

was adopted. When our nation was founded, every state had a direct outlet to the sea connecting it to the rest of the world. Today, about half of our states have no direct outlet to the sea. Those states without an outlet to the sea are dependent on the other states with ports to get their goods onto the world market and to import the commodities they need to survive. Eighty percent of the goods that move through the Port of Norfolk are destined to or arriving from outside Virginia. Two-thirds of the goods that move through the Port of Los Angeles are destined to or arriving from outside California.

The oil that passes through the Washington State navigable waters is not necessarily destined to Washington State consumers. That oil may be destined to ports outside Washington State. Even if delivered to a Washington State port, the ultimate consumer is likely to be located outside Washington State. Any costs imposed by Washington State are borne in part by the citizens of the other northwest states who are the users of the oil. Any disruption in oil delivery because of Washington State regulations is suffered in part by the citizens of the other states who are dependent on that oil to heat their homes and run their businesses.

The Founding Fathers anticipated this problem because they had first hand experience with how the parochial interest of one locality could impact the well-being of the entire nation. They addressed it by removing the power to regulate maritime commerce from the states and placing it with the national government.

SUMMARY OF THE ARGUMENT

Any attempt to unify the 200 plus years of jurisprudence construing the maritime commerce clauses of the Constitution into a single set of consistent principles is analogous to putting a Rubik's cube in order. Every turn that unifies one side of the law seems to move another

side of the law out of order. *Amici* concede that it will take a legal mind greater than theirs to put the entire Rubik's cube of maritime commerce law into order. Nonetheless, *Amici* assert that several consistent principles come through that are relevant to decide the case currently before the Court.

First, the operation of an oil tanker on a navigable waterway is a maritime activity. Any regulation of how an oil tanker is operated on navigable waters, whether by a state or the national government, is a maritime regulation.

Second, when the federal courts review a maritime regulation, they do so pursuant to their grant of admiralty jurisdiction under the Admiralty Clause of the Constitution. The Admiralty Clause provides the jurisdictional basis regardless of whether the claim is couched in terms of tort or contract, and regardless of whethter a preemption claim is based on direct preemption by the Admiralty Clause or indirect preemption through federal legislation that was adopted pursuant to the Admiralty Clause and the Necessary and Proper Clause.

Third, with admiralty jurisdiction comes the automatic application of admiralty law. The application of admiralty law is mandated by the Constitution, not subject to the discretion of the litigants.

Fourth, the Constitution removed the right of states to exercise police powers over vessels operating on navigable waters. States are without the authority to arrest or detain ships on navigable waters. They have no authority to bar ships from their navigable waters. They have no right to negotiate with foreign nations over how ships will be operated in their navigable waters. When the Constitution is read together with the "saving to suitors" clause, 28 U.S.C. § 1333, it is clear that states' retained power over maritime commerce is limited to providing

"remedies" to injured parties, and even that right is subject to constitutional limitations.

When stripped down to the core issues, Washington State took the position below that the Constitution is silent on state regulation of maritime commerce. That absent an act of Congress prohibiting state regulation of maritime commerce, states are free to act. Washington State then pointed to section 1018 of the Oil Pollution Act of 1990 ("OPA 90"), 33 U.S.C. § 2718, as evidence that Congress did not intend to preempt state laws regulating oil tankers in maritime commerce.

Amici assert, that even if Washington State is correct in its reading of OPA 90, its BAP regulations are nonetheless preempted. If not preempted by federal statute, the BAP regulations fall outside the scope of the powers preserved to the states under the Constitution and therefore, are preempted by the Constitution.

ARGUMENT

I. THE OPERATION OF AN OIL TANKER ON NAVIGABLE WATERS IS A MARITIME ACTIVITY THAT FALLS WITHIN ADMIRALTY JURISDICTION.

Amici first assert the obvious—that the operation of an oil tanker on a navigable waterway is maritime commerce. Any regulation of that maritime commerce, whether by the national government or state governments falls within the admiralty jurisdiction of the federal courts.

While there does not appear to be a single precise statement as to what constitutes admiralty jurisdiction, it is now settled law that the constitutional delegation is broader than the admiralty jurisdiction of the English admiralty courts in the late 1700's:

> These decisions were part of a larger trend started in the 19th century of eschewing the restrictive prohibitions on admiralty jurisdiction that prevailed in

England. See e.g., *Waring v. Clarke*, 46 U.S. (5 How.) 441, 454-459 (1847) (holding that the constitutional grant of admiralty jurisdiction did not adopt the statutory and judicial rules limiting admiralty jurisdiction in England); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 456-457 (1852) (rejecting the English tide-water doctrine that "measure[d] the jurisdiction of the admiralty by the tide"); *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 26 (1870) (rejecting the English locality rule on maritime contracts "which concedes [admiralty] jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon").

Exxon Corp. v. Central Gulf Lines, Inc., 500 U.S. 603, 611 n.6 (1991).

One formulation of the grant of admiralty jurisdiction was that of Justice Story, while riding circuit:

> [T]he delegation of cognizance of all civil cases of admiralty and maritime jurisdiction to the courts of the United States comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea.

De Lovio v. Boit, 7 Fed. Cas. 418, 444 (C.C.D. Mass. 1815). The Supreme Court subsequently adopted similar formulations of the scope of admiralty jurisdiction:

> The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts it depends entirely on locality. If the wrongs be committed on the high seas, or within the ebb and flow of the tide, it has never been disputed that they come within the jurisdiction of that court.

Philadelphia, W. & B.R. Co. v. Philadelphia & Havre de Grace Steam Towboat Co., 64 (23 How.) U.S. 209, 215 (1859). *See also Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 207 (1996) (Essentially restating Justice Story's formulation of admiralty jurisdiction concerning torts). *Exxon*, 500 U.S. at 611 n6. (Essentially restating Justice Story's formulation of admiralty jurisdiction concerning contracts holding that "in determining whether a contract falls within admiralty, 'the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions." *quoting Dunham*, 78 U.S. at 26.). See also 46 App. U.S.C. § 740:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in *rem* or in *personam* according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water[.]

Admiralty Jurisdiction for torts now has two components: (1) location—i.e., on a navigable water, and (2) a connection with maritime activity. *Jerome B. Grubart, Inc. v. Great Lakes Dredging & Dock Co.*, 513 U.S. 527, 534 (1995). Under even the narrowest formulation of admiralty jurisdiction, an oil spill from an oil tanker operating on navigable water is a maritime tort that falls within the federal court's admiralty jurisdiction.

The BAP regulations are directed at preventing this maritime tort. The BAP regulations change how oil tankers must be operated on navigable waters—i.e., regulate the navigation of tankers—and falls within admiralty jurisdiction. If the point is not already settled, the federal

statutes at issue in this case were adopted pursuant to the Admiralty Clause and Necessary and Proper Clause.[2]

For the reasons stated above, this Court reviews the BAP regulations under its constitutional grant of admiralty jurisdiction.[3]

II. WITH ADMIRALTY JURISDICTION AUTOMATICALLY COMES ADMIRALTY LAW.

The jurisdictional analysis is critical to resolving this case because it dictates what substantive law must be applied. When a case falls within the admiralty jurisdiction of the federal courts as a factual matter, regardless of how the parties plead the case,[4] the courts must apply

[2] Each of the federal statutes in question in this case is codified within either Title 33 or Title 46 of the United States Code. Federal statutes enacted pursuant to the admiralty jurisdiction are found throughout these titles. As the House Committee on the Merchant Marine noted over 15 years ago, the various "maritime laws" codified within these two titles are a "confusing collection" of laws long in need of major revision. H.R. Rep. No. 338, 98th Congress, 1st Sess. (1983) p-113. Despite Congressional attempts since then to revise maritime law in an orderly fashion, much of it remains as confused as ever today.

[3] The admiralty jurisdiction of the federal courts provides an exception to the Eleventh Amendment that limits bringing claims in the federal courts against states without their consent. *See California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) (holding that admiralty claims are neither "suits in law or equity" as those terms are used in the Eleventh Amendment and thus are not precluded by the Eleventh Amendment.)

[4] While the Ninth Circuit did not address the admiralty law issues, it appears that the issues were presented below. INTERTANKO Brief at 9 ("INTERTANKO contends here that the challenged Washington BAP Regulations are fatally defective under each of four clauses of the Constitution of the United States (Supremacy, Foreign Affairs, Commerce **and Admiralty**)." (emphasis added)). *See also The International Association of Independent Tanker Owners (INTERTANKO) v. Locke*, 148 F.3d 1053, 1063 (9th Cir. 1998) (Noting that the United States also raised concerns about the right of "innocent passage," a maritime law right under international law).

admiralty law. *See Yamaha*, 516 U.S. at 206 ("'With admiralty jurisdiction,' we have often said, 'comes the application of substantive admiralty law.'" *quoting East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986).).

As discussed in more detail below, the constitutional analysis to determine whether a state law is preempted under the Commerce Clause and the Admiralty Clause are fundamentally different. *Amici* respectively submit that it is the Court that must decide what substantive law to apply based on the subject matter of the litigation. The litigants simply cannot dictate whether a Commerce Clause or Admiralty Clause analysis is used by the Court.[5] When the subject matter is admiralty in nature, admiralty law provides the standard for review. *Chelentis v. Luckenback S.S. Co., Inc.*, 247 U.S. 372, 384 (1918). In *Chelentis*, the plaintiff filed a complaint in state court pursuant to state common law theories and disavowed all admiralty law claims and remedies. The defendant removed the case to federal court based on diversity jurisdiction, rather than admiralty jurisdiction. Nonetheless, both the Court of Appeals and the Supreme Court held that federal maritime law must be applied because of the maritime nature of the claim.

To further illustrate the point, the Ninth Circuit in this case relied on three Supreme Court decisions to provide the standard of review. *INTERTANKO*, 148 F.3d at 1059, *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1974). *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). *Retail Clerks International v.*

[5] *Amici* concede that a state law might have both maritime and non-maritime applications. If only the non-maritime applications were challenged, then the legal analysis could be limited to a Commerce Clause analysis. But that fact pattern is not the case currently before the Court. The application of the BAP regulations at issue in this case is a pure maritime commerce application.

Schermerhorn, 375 U.S. 96, 103 (1963). Each of these cases involves a Domestic Commerce Clause challenge to a state law. *Rice* involved the right of a state to regulate a grain storage warehouse. *Malone* involved the right of a state to regulate private pensions. *Retail Clerks International* involved the right of a state to require open shops in labor agreements.

None of these three cases had even the remotest connection to maritime commerce. Instead, they all involved federal laws that were enacted pursuant to the Domestic Commerce Clause. Could it seriously be argued that the parties to those cases could have forced the Supreme Court to apply admiralty law to those claims by simply briefing the claims under admiralty law, rather than Domestic Commerce Clause jurisprudence? The answer is obviously "NO." It is the courts, not the parties, that dictate what law must be applied. The courts make that decision based on the subject matter of the litigation. When the subject matter is maritime commerce, admiralty law must be applied.

Because the Washington State regulations fall within the admiralty jurisdiction of the federal courts, their validity must be viewed through the prism of the national maritime law. It is maritime jurisprudence that provides the standard of review for this martime case, not other jurisprudence. As discussed below, that standard of review under the Admiralty Clause is fundamentally different from the standard of review in non-admiralty cases. *See American Dredging Co. v. Miller*, 510 U.S. 443, 453 n.3 (1994) (noting that the preemption analysis under the Admiralty Clause and negative-Commerce Clause are fundamentally different.). *Amici* respectfully submit that the Court is simply without the constitutional authority to decide a case that falls within the Court's admiralty jurisdiction under other than admiralty law.

Amici believe two other doctrines support their position that the case before the Court must be analyzed under maritime law. First, it is settled law that the Federal courts must interpret federal and state statutes so as to maintain, rather than destroy their constitutionality. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992). *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.")

Second, in a related doctrine, Mr. Chief Justice Marshall admonished that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ." *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) *citing The Charming Betsey*, 6 U.S. (2 Cranch) 64, 118 (1804). *See also The Nereide*, 13 U.S. (9 Cranch) 388, 389 (1815). *MacLeod v. United States*, 229 U.S. 416, 434 (1913). *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918).

The case before the Court requires the Court to construe international treaties and federal laws. Should the Court construe those treaties and statutes in question under anything other than admiralty law, *Amici* believe that there is a significant risk that those statutes may be construed in such a manner as to be unconstitutional under admiralty law. Such an unconstitutional construction should be avoided if possible.

For the reasons stated above, *Amici* assert that the claims before the Court must be reviewed under the applicable maritime commerce clauses.

III. WASHINGTON STATE DOES NOT HAVE ANY RETAINED "POLICE POWERS" THAT ALLOW IT TO REGULATE MARITIME COMMERCE.

Amici submit that states simply have *no* retained "police powers" over matters that fall within admiralty jurisdiction. In making this assertion, *Amici* are using the phrase "police power" in the constitutional sense—i.e., a state power, preserved by the Tenth Amendment, allowing the individual states to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health and morals or the promotion of the public convenience and general prosperity. Paraphrasing *Black's Law Dictionary*, 1157 (Centennial Edition 1891-1991). Inherent in "police powers" is the right of prior restraint and the right to punish a citizen for conduct where no harm has yet occurred. It is these powers—the power of prior restraint and to punish before harm has occurred—that states are without in the area of maritime commerce.

A. The Admiralty Clause and the "Saving to Suitors" Clause Deny States the Police Power to Regulate Maritime Commerce.

Instead of having the power of prior restraint over maritime commerce, states have the limited power to provide "remedies" to "suitors"—a right that is fundamentally different than "police powers." It is settled law that the right to interpret and modify admiralty law is vested by the combination of the Constitution and federal statutes, exclusively in the federal government:[6]

> By the Constitution, the entire admiralty power of the country is lodged in the federal judiciary, and

[6] *Amici* submit that admiralty jurisdiction is vested exclusively in the federal courts by statute, but such jurisdiction could be vested in the states had Congress so chosen. On the other hand, the right to create or modify admiralty law is vested exclusively in the federal government by the Constitution.

> Congress intended by the ninth section to invest the District Courts with this power, as courts of original jurisdiction.

The New Jersey Steam Navigation Company v. The Merchants' Bank of Boston, 47 U.S. (6 How.) 344, 390 (1848). It also is settled that there is concurrent jurisdiction between state common law courts and federal admiralty courts in some limited areas. This concurrent jurisdiction was incorporated into the Constitution and is reflected in part of one of the first acts of Congress, frequently referred to as the "saving to suitors" clause. The modern version of the "saving to suitors" clause reads as follows:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all other remedies to which they are otherwise entitled. (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

28 U.S.C. § 1333. The first Congress that drafted the "saving to suitors" clause contained many of the delegates to the constitutional convention and state representatives who ratified the Constitution. As such, it has been presumed to reflect the founders' understanding of the lines between federal and state jurisdiction under the Constitution.

Neither the Constitution nor the "saving to suitors" clause preserves to the states police powers to regulate maritime commerce. Under the "saving to suitors" clause, "admiralty or maritime jurisdiction" is "exclusive"—i.e., the states' executives, legislatures and courts simply have no admiralty jurisdiction. Limited states' rights are preserved, but subject to three limitations. State laws can only provide "remedies," those remedies can only be pro-

vided to "suitors," and those "remedies" must be "remedies" that the "suitor" would have been "otherwise entitled" to under the common law.

On its face, the "saving to suitors" clause only preserves for the states a right to provide "remedies."

> The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's Law Dictionary. Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law.

Chelentis, 257 U.S. at 384. A state may provide remedies "so long as it does not attempt to make changes in the 'substantive maritime law.' " *Madruga v. Superior Court of Cal., County of San Diego*, 346 U.S. 556, 561 (1954) *quoting Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924).

The Supreme Court has described what was left for the states under the "saving to suitors" clause as follows: "This leaves the concurrent power where it stood at common law. The clause has no application to seizures arising under the revenue laws, or laws of navigation, as those belong exclusively to the District Courts." *The New Jersey Steam Navigation Company*, 47 U.S. at 390.

Amici submit that state police powers, to the extent that phrase is used to encompass prior restraint of conduct, are simply not "remedies" as that term is used in the "saving to suitors" clause. Instead, remedies should be given its ordinary meaning—i.e., redress for an injury whether

from tort or breach of contract. Implicit in the term "remedies" is the concept that state laws may only act remedially, not proactively. The task of preventing maritime torts (i.e., regulating maritime commerce) was preserved by the Constitution and laws of the United States to the national government.

Amici further submit that a state enforcing a regulation is not a "suitor" as that term is used in the "saving to suitors" clause. Instead, the term "suitors" should be given its more natural meaning as the parties to civil litigation. That is not to say that a state cannot be a "suitor" when it has been injured by a maritime tort. It can. But such a case is a far cry from the role a state plays when exercising its police powers. In that capacity, the state is simply not a "suitor."

Finally, *Amici* submit that a state regulation of oil tankers is not a remedy that a state is "otherwise entitled" to under the common law. The BAP regulations have no relationship to the type of civil actions that could be entertained by common law courts at the time the Constitution was adopted.

For these reasons, *Amici* submit that the BAP regulations fall outside the scope of the "saving to suitors" clause, and thus, outside the scope of the powers retained by the states. Instead, state regulations covering how a commercial ship on navigable waters is operated would appear to be a type of navigation rule. As the Court long ago held, states simply have no retained power over such laws of navigation. *The New Jersey Steam Navigation Company*, 47 U.S. at 390.

B. Other Clauses of the Constitution Support the Position That States Have No Retained Police Power to Regulate Maritime Commerce.

Amici noted above, while the principal constitutional provision governing maritime commerce is the Admiralty

Clause, the Constitution contains other provisions that directly or indirectly implicate maritime commerce. *Amici* submit that these other constitutional provisions support their reading that the BAP regulations are outside the scope of Washington State's authority. This other provisions of the Constitution must be considered by the Court to help guide its interpretation because the construction of any single provision of the Constitution depends on a "fair construction of the whole instrument." *M'Culloch v. State of Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819).

As noted above, the BAP regulations are predicated on the assertion that states have the retained police power to regulate maritime commerce. That absent an act of Congress directly removing that state authority, the Constitution leaves the states free to regulate maritime commerce. Such an assertion is simply not consistent with the plain text of the Constitution.

Maritime commerce can be divided into four categories of vessels: ships of war, privately controlled commercial vessels; government controlled commercial vessels,[7] and pleasure craft. See 46 App. U.S.C. § 1701 *et seq.* The Constitution does not distinguish between these types of vessels.[8] Therefore, if Washington State has the retained police power to regulate some of these vessels, it has the retained policy power to regulate all of them. If Washington State can restrict privately held commercial vessels from its navigable waters, it can restrict foreign government controlled commercial vessels as well. If Washington State can arrest or fine the owners of privately held

[7] For example, today, the Chinese government is now one of the largest owner/operators of commercial vessels in the world. These Chinese government owned vessels routinely call on the ports of the United States.

[8] However, United States warships are treated differently under the Constitution because of the Supremacy Clause.

commercial vessels, it can arrest or fine the foreign governments that own government controlled commercial vessels. But, such an assertion is absurd on it face.

Take as an example, a theoretical incident where Washington State stops and inspects a foreign government controlled oil tanker bound from Canada to Alaska that was operating lawfully in the navigable waters of Washington State under all laws of the United States and applicable treaties. Washington State then arrests the ship or issues fines to the owners under Washington State law.

Such an action would implicate a number of constitutional provisions beyond the Admiralty Clause. First, such a state action would implicate the Commerce Clauses, both foreign and domestic. Since *Amici* presume that the parties will fully address this issue, no more need be said in this brief.

Second, such a dispute between Washington State and a foreign government would necessitate a diplomatic resolution. But on what authority does Washington State negotiate such a resolution with a foreign government? The Constitution bars such diplomatic efforts. U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . .") U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of the Congress . . . enter into any Agreement or Compacted with another State, or with a foreign Power[.]"). Only the national government can negotiate and enter into agreement with foreign governments over the operation of foreign vessels in United States waters. The implications of this Constitutional limitation is that the states cannot take actions against foreign vessels that would necessitate resolution through diplomatic agreement.

Third, the conduct of a state in stopping and searching a foreign flagged vessel is itself troublesome. The Constitution contains an express bar against states having

ships of war without the consent of the national government. U.S. Const. art. I, § 10, cl. 1 ("No State shall, without the Consent of the Congress . . . keep . . . Ships of War in time of Peace[.]") This provision must be viewed as it was at the time the Constitution was adopted. This provision did more than bar states from owning certain types of armaments. When viewed in its historical context, this constitutional provision effectively barred states from possessing the tools that would have been necessary to interfere with maritime commerce, even in the state's own waters. In the era of sailing ships, this constitutional bar precluded one state from interfering with the maritime commerce destined to another state perhaps more effectively than any other constitutional bar could have. Just as the First Amendment must now be applied to radio and television, this constitutional provision must be applied to modern techniques of projecting power on navigable waters.

Finally, to the extent Washington State claims to act pursuant to an act of Congress granting it the authority to interfere with maritime commerce, the constitutionality of that act of Congress is immediately called into question. Congress may not delegate to the states the right to interfere with maritime commerce under the Admiralty Clause. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). Congress also does not have the constitutional authority to authorize a state to detain vessels bound to or from another state. U.S. Const. art. I, § 9, cl. 6 ("[N]or shall Vessels bound to, or from, one State, be obligated to enter, clear, or pay Duties in another.") Thus, to the extent Washington State asks the Court to construe federal statutes as granting them the right to interfere with maritime commerce and force foreign vessels bound to or from other states to heave to and stand by for boarding, Washington State calls in to question the constitutionality of those federal statutes.

When these various provisions of the Constitution are read together, they provide a clear picture that the Founding Fathers intentionally limited the rights and ability of states to interfere with maritime commerce. At the time the Constitution was written, virtually every state had at least one port that shared a common bay or estuary with another state. As such, the maritime commerce of virtually every state was at the mercy of other states. The Port of Philadelphia was potentially threatened by the decisions of Delaware and New Jersey, the Port of Baltimore could be threatened by the decisions of Virginia, the Port of Newark could be threatened by New York, the Port of Savannah could be threatened by North Carolina, and so on and so on. The Founding Fathers were well aware of this problem. See Mr. Webster's argument to the Court, *Gibbons*, 22 U.S. at 11-14.

Washington State takes the position that the only remedy one state has to the potential catastrophic interference with maritime commerce from another state is to resort to the political process. Washington State's position is that absent an act of Congress, states are free to interfere with maritime commerce. Nothing could be further from the truth.

Instead of leaving maritime commerce to the whims of the political process, the Founding Fathers protected maritime commerce in the Constitution. While Supreme Court decisions limiting the rights of states to regulate maritime commerce may not always be politically popular, like many provisions of the Constitution and the Bill of Rights, the maritime commerce protections were included in the Constitution to avoid having these rights be subjected to the political winds of the day. Their purpose—to protect maritime commerce from the interference of the states—must still be given effect today.

IV. IF WASHINGTON STATE HAS RETAINED POLICE POWERS TO REGULATE MARITIME COMMERCE, THOSE REGULATIONS STILL MUST SURVIVE UNDER *JENSEN*.

Should the Court find that the BAP regulations fall within the scope of the "saving to suitors" clause, that is only the beginning, rather than the end, of the inquiry. Remedial state regulations that address maritime commerce still must survive constitutional scrutiny. For example, states' remedies that are *in rem* are *per se* unconstitutional. *Red Cross Line*, 264 U.S. at 124. *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1867). The Supreme Court has articulated the constitutional test for evaluating state remedies:

> And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.

Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917). The Court has consistently looked to this formulation when analyzing state laws that affect maritime commerce. *See Yamaha*, 516 U.S.. at 207. *American Dredging*, 510 U.S. at 447.

A. There Is No Presumption in Favor of the Validity of State Laws When Those State Laws Affect Maritime Commerce.

The first test of constittuionality articulated in *Jensen* is that a state law is unconstitutional if it "contravenes the essential purpose expressed by an act of Congress." *Jensen*, 244 U.S. at 216. This test is analogous to the traditional Domestic Commerce Clause/Supremacy Clause analysis with one important difference—there is no presumption that the state law is valid under an Admiralty Clause analysis.

Amici have been unable to identify any Admiralty Clause preemption case where the Court presumed the validity of the state law in question. For example, the Supreme Court has considered Admiralty Clause preemption in two recent cases. *Yamaha*, 516 U.S. at 119. *American Dredging Co.*, 510 U.S. at 443. In neither of these cases did the Court presume the validity of the state law.

Amici suspects that there will be extensive analysis by the parties in this case as to the question of whether the state BAP regulations contravene the essential purpose expressed by an act of Congress. Therefore, *Amici* will not attempt to duplicate that analysis here.

B. State Laws That Are Not Expressly Preempted by Federal Statute Are Still Preempted if They Interfere With the Uniformity of Maritime Law.

Even assuming *arguendo* that the BAP regulations are not inconsistent with an act of Congress, they still may be unconstitutional under the Admiralty Clause under the second and third branches of *Jensen*. *Amici* again note that the Admiralty Clause analysis is fundamentally different than the negative-Commerce Clause analysis. While the negative-Commerce Clause is concerned with harm to commerce and uses a balancing test, the Admiralty Clause is concerned with prejudice to, harmony with, and uniformity of the national maritime law. *American Dredging Co.*, 510 U.S. at 452 n.3. *Amici* submit that the Admiralty Clause test is significantly more difficult for a state to meet than is the negative-Commerce Clause.

Uniformity has always been at the center of the constitutional grant of maritime jurisdiction to the federal government. As the Supreme Court held long ago:

> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. 558, 575 (1874).

> If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.

Jensen, 244 U.S. at 217.

> Thus, the "fundamental purpose" underlying the grant of federal admiralty jurisdiction is "[t]o preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government."

Knickerbocker, 253 U.S. at 160. Or as the Court more recently noted:

> The fundamental interest giving rise to maritime jurisdictions is "the protection of maritime commerce," and we have said that that interest cannot

> be fully vindicated unless "all operators of vessels on navigable waters are subject to uniform rules of conduct."

Sisson v. Ruby, 497 U.S. 358, 367 (1990) *quoting Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982).

No argument can be made that the BAP regulations are consistent with the constitutional prerequisite of uniformity. An oil tanker that complies with the laws of the United States and may lawfully enter the navigable waters of the other states may nonetheless be barred from entering the navigable waters surrounding Washington State. This position is the antithesis of uniformity and cannot withstand constitutional scrutiny.

It can be argued that the Supreme Court has already answered the question now before it. The State of New York took the same position 175 years ago that Washington State now takes. *Gibbons*, 22 U.S. 1. New York argued that it retained the right to control which commercial vessels entered its navigable waters and ports. The Supreme Court rejected New York's claims out of hand. *Amici* submit that there is no reason to reach a different conclusion today.

CONCLUSION

For all the reasons stated herein, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

-and-

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

v.

GARY LOCKE, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County; K. CARL LONG, Prosecutor of Skagit County; JAMES H. KRIDER, Prosecutor of Snohomish County; NORMAN MALENG, Prosecutor of King County; NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL and OCEAN ADVOCATES,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of *Amici Curiae* Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Organized Fisherman of Florida, Inc., Maine Lobstermen's Association, Massachusetts Lobstermen's Association, Cape Cod Commercial Hook Fishermen's Association and Washington Trollers Association in Support of Respondents

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Appendix — Pacific Coast Federation Of Fisherman's Associations Members 1a

INTERESTS OF THE AMICUS CURIAE

The parties' consent to the filing of this brief was lodged with the Clerk of this Court in accordance with Supreme Court Rule 37.[1]

Founded in 1976, the Pacific Coast Federation of Fishermen's Associations ("PCFFA") is the largest trade association of working commercial family fishermen and women on the west coast of the United States. PCFFA is a nonprofit federation and trade association consisting of twenty-five different port associations, fishermen's marketing associations and commercial fishing vessel owner's associations spanning the Pacific coast from San Diego to Alaska with a combined membership of about 2,500 commercial fishing vessels.[2]

The Institute for Fisheries Resources ("IFR"), founded in 1992, is a nonprofit organization dedicated to the protection and restoration of marine and anadromous fish resources throughout the west coast. IFR is closely affiliated with PCFFA and manages PCFFA's fishery conservation and restoration programs.

The Organized Fisherman of Florida, Inc., is Florida's largest organization of small boat commercial fishermen. Its members participate in many small boat fisheries in the U.S. Gulf states region and help provide jobs and high quality seafood to coastal communities in their area.

Maine Lobstermen's Association is the largest fishermen's trade association on the east coast, with more than 1,200

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1. In accordance with Supreme Court Rule 37.6, *Amici Curiae* certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than *Amici Curiae*, has made a monetary contribution specifically for the preparation or submission of this brief.

2. A complete list of PCFFA members is included at Appendix 1.

members supplying fresh lobsters to much of the eastern seaboard and for export.

Massachusetts Lobstermen's Association is the second largest fishermen's trade association on the east coast, with more than 1,000 commercial fishermen members from Maine to New York.

The Cape Cod Commercial Hook Fishermen's Association ("CCCHFA") is a grassroots organization comprised of commercial fishermen and other concerned coastal residents whose rich cultural heritage and traditional economies depend on the productivity and health of the marine ecosystems around them. The CCCHFA has over 500 members, of whom 260 are commercial fishermen and 240 are supporting coastal residents and businesses.

The Washington Trollers Association is the largest organization of commercial troll fishermen in the State of Washington, and represents commercial troll fishermen in all matters related to fisheries regulation, management, legislation, environmental concerns and enforcement.

Collectively, the above organizations appear here as a voice for the thousands of working class families, individuals and professionals who derive their incomes largely from harvesting the natural resources of the sea.

INTRODUCTION & SUMMARY OF ARGUMENT

Throughout the latter half of this century, pollution has emerged as the single greatest threat to the nation's marine resources and fisheries. From oil spills to nutrient loading, environmental threats to the once bountiful ocean and coastal fisheries have pushed many coastal fisheries near to biological collapse. Nearshore waters and coastal estuaries provide essential nursery areas for species that contribute about 75% of all U.S. commercial fish and shellfish landings, and 81-89% of

all recreational catches outside Alaska and Hawaii.[3] Coastal-dependent fish and shellfish harvests contribute roughly $46 billion annually to the U.S. economy, supply more than 600,000 jobs, and provide one of the nation's healthiest food sources.[4] Even so, relatively recent harms to coastal waters and dependent marine life attributable to pollution still cost the commercial fishing industry and the U.S economy an estimated $27 billion annually, enough to support an additional 450,000 family wage earning jobs.[5]

The nation's irreplaceable coastal marine resources are fragile, and the need for their protection from oil pollution and other causes of habitat loss has long been the shared policy of both coastal states and the federal government.[6] Historically, states have enacted many laws to protect coastal fisheries and the natural resources upon which local commercial, Native American, and subsistence fishermen's livelihoods depend. In

3. *See* U.S. Department of Commerce (NOAA), National Marine Fisheries Service, Current Fishery Statistics No. 9205, *Marine Recreational Fishery Statistics Survey, Pacific Coast, 1987-1989*, and Current Fishery Statistics No. 9204, *Marine Recreational Fishery Statistics Survey, Atlantic and Gulf Coasts, 1990-1991*.

4. *See* J.R. Chambers, *Coastal Degradation and Fish Population Losses in* Symposium on Coastal Fish Habitat Conservation, Baltimore, MD (R.H. Stroud ed., 1991) (published by the National Coalition for Marine Conservation); Institute for Fisheries Resources, East Coast Fisheries Foundation and Pacific Coast Federation of Fishermen's Assoc., *Marine Fishery Habitat Protection: A Report to the Unisted States Congress and the Secretary of Commerce* (March 1994).

5. *See id.*

6. For an example of the federal government's recognition of the importance of fishery habitat protection, see Office of the Inspector General, U.S. Department of Commerce, Final Report, IRM-5442, *Program Evaluation, Major Initiatives Needed to Protect Marine Habitats* (January 1994). *See also* Magnuson-Stevens Sustainable Fisheries Act (16 U.S.C. §§ 1801(a)(9) and (b)(7)).

particular, the state of Washington has actively sought to protect the health and welfare of its fisheries and coastal communities through the passage of its Shoreline Management Act, creation of the Puget Sound Water Quality Authority, implementation of tug escort requirements in 1975,[7] and more recently in the form of Washington's Best Achievable Protection Regulations (hereinafter "BAP safety regulations"). These safety regulations apply to oil tankers travelling through unique and highly treacherous state waters such as the Strait of Juan de Fuca and Puget Sound.

The state of Washington enacted the BAP safety regulations to protect its fisheries, seafood, and coastal communities from catastrophic oil spills. This action represents a valid exercise of state police powers. The U.S. Constitution gives all states broad authority to regulate matters affecting their citizenry's welfare and safety, including ensuring that hazardous substances do not contaminate state waters and food sources. Congress has long recognized the states' integral role in management of activities affecting state natural resources and public safety, and therefore has sought to preserve and expand the traditional role of the state in establishing regulations protecting state natural resources and activities that might affect them.

Washington's BAP safety regulations do not contradict federal regulations, nor do they unduly burden interstate or foreign commerce. Indeed, state safety regulations, such as Washington's, provide an effective means of preventing oil pollution, "an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent." *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 328-29 (1973).

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7. Washington was the first state to implement these requirements.

Comparing the nominal economic burden safety standards such as the BAP safety regulations might place on the oil tanker industry to the substantial risks a major oil spill presents to state natural resources and the livelihood of working class family fishermen, local tribes, and coastal communities, the need to enact protective safety regulations aimed at preventing catastrophic oil spills is plain. Conservative estimates show the cost of yearly compliance with these regulations for tankers would be *billions of dollars less* than the potential cleanup costs to the tanker industry for a single major oil spill, even without considering the additional damage costs to the fishing communities and others directly affected by such a disaster. Washington's BAP safety regulations target human error, by far the single largest contributing cause to catastrophic oil spills, and thus will help to avert these grave yet needless accidents in the future. The Court would perform a great service to coastal fishing-dependent communities and the families of commercial fishermen throughout this nation by upholding Washington's BAP safety regulations and allowing states to continue to protect the marine resources upon which many of its citizens depend for their food and livelihood.

ARGUMENT

I. OIL SPILLS PRESENT A SUBSTANTIAL THREAT TO THE HEALTH AND WELFARE OF COASTAL STATES AND THEIR RESOURCES.

A. The *Exxon Valdez*

Shortly after midnight on Good Friday, March 24, 1989, the supertanker *Exxon Valdez* ran aground on the well-marked Bligh Reef in pristine Prince William Sound. The impact ripped open the vessel, and within hours nearly 11 million gallons of crude oil spilled into one of the most productive and diverse marine ecosystems in the world, causing damage that may never be undone. The disaster was due entirely to a combination of

human errors, including a drinking captain leaving an inexperienced third mate at the helm. Had regulations similar to the BAP safety regulations been in place, the catastrophe caused by the *Valdez* spill may have been substantially mitigated or prevented.[8] Years later, despite spending more than $2.5 billion in an effort to remedy the harm caused by the *Valdez* oil spill, the impacts on marine life and local fisheries are still apparent.[9]

The threat of a *Valdez*-like spill occurring in Washington waters is real. Washington's internal waters, the Strait of Juan de Fuca and Puget Sound, are the primary marine conduits for crude oil and refined petroleum products to and from the region. An average of two tankers a day transit Washington waters, the largest carrying as much as 40 million gallons of crude oil — three times the amount spilled by the *Exxon Valdez*.[10] In fact, just one month after the 11-million gallon disaster in Alaska's waters, the tanker *Exxon Philadelphia* lost power close to the shore of Cape Flattery, near the mouth of the Strait of Juan de

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8. The BAP safety regulations were developed with the assistance of the Coast Guard and tanker operators and managers and specifically target human error caused by improper operating procedures and lack of understanding of Washington's treacherous internal waters, *see, e.g.*, Wash. Admin. Code 317-21-200 (watch manning requirements in limited visibility, navigation requirements, pilotage requirements); Wash. Admin. Code 317-21-205 (voyage plans and navigational requirements); Wash. Admin. Code 317-21-230 (personnel training and qualifications); Wash. Admin. Code 317-21-235 (drug and alcohol testing requirements).

9. *See* University of Alaska, Fairbanks, Alaska Sea Grant College Program, Report No. 95-02, *Prevention, Response, and Oversight Five Years After the Exxon Valdez Oil Spill: Proceedings of an International Conference*, 5 (1995).

10. *See* Eric Nalder, *Oil Laden Tanker Safety a Concern as Fleets Merge*, Seattle Times, July 25, 1999.

Fuca.[11] The tanker, carrying 23 million gallons of crude oil, drifted out of control for nearly seven hours.[12] Luckily, tugboats arrived in time to prevent the *Exxon Philadelphia* from becoming another *Exxon Valdez*. And, just this October, the *Angelo D'Amato* and *New Endeavor*, two tankers carrying a combined total of 36 million gallons of fuel and light crude, required the aid of emergency rescue tugs to avoid another *Valdez*-sized spill.

B. Harm to Natural Resources.

The *Exxon Valdez* spill in Alaskan waters provides one of the most recent and powerful examples of both the ecological and economic impacts of an oil spill. Sadly, the kinds of harm caused by the *Valdez* spill are not unique, but rather are typical of the impacts caused by any spill, all of which affect the welfare and livelihood of countless people.

There is a long history of tanker oil spills nationwide. Other spills that have recently polluted the waters in the Pacific Northwest include: a 2.3 million gallon spill off the Olympic coast in 1972; a 239,000 gallon tanker spill off Port Angeles, Washington in 1985; a 231,000 gallon tanker spill along Grays Harbor, Washington in 1988; and a 400,000 gallon spill along the Olympic coast in 1991. Other regions of the country also have been polluted: in 1990, a tanker ran aground in the Kill Van Kull in the New York/New Jersey Harbor, spilling over 250,000 gallons of oil, closing beaches and killing endangered piping plovers; in August of 1993, three ships collided in the main channel leading into the Port of Tampa Bay, spilling 328,000 gallons of oil into the water with an even larger amount catching fire, seriously polluting the air of this highly populated

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11. *See* Puget Sound Water Quality Authority Issue Paper, *Spill Prevention: Means of Preventing Spills of Petroleum and Other Hazardous Substances in Puget Sound* 3 (March 1990).

12. *Id.*

area; in January of 1994, a barge ran aground in Puerto Rican waters after its towing cable broke, and 750,000 gallons of oil spilled into the ocean off a popular beach area; in January of 1996, off the shore of Rhode Island, the *North Cape* barge had to be abandoned after the tug towing it caught fire, and 820,000 gallons of #2 fuel oil were spilled into economically important fisheries; and in March of 1996, a barge in the Houston Ship Channel almost split in two, spilling 714,000 gallons of oil into Galveston Bay. Many similar examples could also be listed.

Large tanker spills like the *Valdez* account for 95% of the total volume of all oil spilled worldwide. Recovery efforts can save only about 8% of oil involved in such a spill, thus leaving the other 92% to evaporate, burn, or settle into the water column and disrupt the fragile marine environment.[13]

Oil spills in marine waters drastically impact fish and wildlife in both the short and long-term. *See Askew*, 411 U.S. at 334-34 & n.5 (citing Note, 10 Harv. Int'l L.J. 316, 321-323 (1969)). Oil smothers birds and other marine life. Experts estimate that over 300,000 birds were killed by the *Valdez* spill.[14] Sea otters also showed immediate physical effects from the *Valdez* oil spill. Their thick insulating fur absorbed oil and impaired natural buoyancy, they ingested oil while attempting to groom and thus suffered lethal internal injuries, and toxic aromatics emitted by the oil suffocated them.[15] The immense impact of the spill on smaller creatures such as amphipods and

13. *See* Mark T. Peterson, Comment, *State Incentive Based Oil Tanker Regulation: An Alternative to Traditional Command-and-Control Regulation*, 4 Ocean and Coastal L.J. 271, 273 (1999).

14. Maurie J. Cohen, Ph.D., Economic Aspects of Technological Accidents: An Evaluation of the Exxon Valdez Oil Spill on South Central Alaska 91 (1993) (published dissertation, University of Pennsylvania).

15. *Id.* at 91-92.

copepods (which form the base of ocean food chains) has caused independent biologists to estimate that recovery of the area affected by the *Valdez* spill will require a minimum of thirty years.[16]

Aside from the immediate physical effects of an oil spill, oil impacts the long-term viability of the marine and coastal ecosystem by chemically breaking down the ecosystem's biologic foundations as it persists in the water column and in the crags or under rocks on-shore. A joint State/Federal Natural Resource Damage Assessment Study conducted from 1989-1991 of the *Exxon Valdez* spill area revealed startling results. The study found a widespread and continuing exposure of many fish species to oil.[17] More surprisingly, the study found evidence of pollock exposure to petroleum one year after the spill at Tugdak Island, more than 400 miles from Bligh Reef. "Pollock, a major fisheries resource in Alaskan waters, are bathypelagic fish which feed in the water column. Thus, these results suggest that the spilled oil affected either the water column or food supply of these fish at great distances from the spill, and for some time after the spill."[18] Today, locals continue to find oil balls on the beaches of Prince William Sound a decade after the *Exxon Valdez* ran aground.

In short, the effects of an oil spill on marine life are devastating and persistent. With many of the nation's fisheries already under severe biological stress, the ecological integrity of the marine environment depends upon avoiding the catastrophic effects of oil pollution by preventing the spills that create it.

16. *Id.* at 93.

17. *See* Exxon Valdez Oil Spill State/Federal Natural Resource Damage Assessment, Final Report, *Assessment of Oil Spill Impacts on Fishery Resources: Measurement of Hydrocarbons and Their Metabolites, and Their Effects, in Important Species* (September 1995).

18. *Id.*

C. Economic Harm to Fisheries Caused by an Oil Spill.

The disastrous impact an oil spill has on natural resources alone justifies the strongest preventative measures. In addition to the ecological effects, however, an oil spill also directly and substantially affects the livelihoods of people dependent on marine resources. The local fishing economy suffers the immediate brunt of an oil spill. And, to the individual and family fisherman, a large spill such as the *Valdez* often means economic ruin.

One of the most severe impacts on fishing families is the immediate closure of fishing grounds. Depending on the magnitude of the spill, these closures may last days, weeks, an entire season, or even years. With fishing profit margins already squeezed tightly, any sudden closure drastically reduces the ability of families dependent on commercial fishing to earn a living. After the *Valdez* oil spill, for example, Alaska closed every fishing area impacted by the spill, resulting in a severely limited commercial salmon fishing season for 1989 and a total cancellation of the 1989 spring herring season throughout several portions of the region. Oil spills also result in decreased market confidence created by a "poisoned fish" mentality: people are unwilling to buy fish from a known polluted area. Consequently, after the *Valdez* spill observers noted that "[o]il was still present in the salmon fishing areas when adult salmon returned in the summer of 1989. Nets could not avoid straining oil and water; oiled nets contaminated the salmon held by them; and oil-contaminated salmon could not be sold."[19]

The effects of any major oil spill on the local fishing economy are devastating. For instance, following the *Valdez* spill the town of Cordova, Alaska (population 2,500), went from being the nation's 7th most lucrative port for commercial fish

19. Wells, Butler & Hughs, *Exxon Valdez Oil Spill: Fate and Effects in Alaskan Waters* 16 (ASTM 1995).

harvest to the 51st in 1993. Cordova's fishing revenue was cut nearly in half after the disaster, reduced from $46 million in 1988 to $26 million in 1997.[20] For some fishermen, the value of salmon fishing permits dropped $250,000 per permit, and subsequent bankruptcy filings by local family fishermen became commonplace. Because of the oil spill the livelihood of the working class fishing family in Cordova was devastated.

The coastal communities of Alaska, like Cordova, are typical of the coastal fishing-dependent communities where *Amici*'s members reside. These communities depend on commercial fishing and fish processing for a large portion of local jobs and economic well being.

Any widespread fishery closure or poison panic caused by an oil spill would negatively and substantially impacts a region's fishing revenue. Following the *Valdez* disaster, Alaska lost an estimated $11 to $45 million in fishing revenue region-wide in a single year.[21] Similar economic impacts on Washington communities would occur should a tanker oil spill occur in the Strait of Juan de Fuca or within Puget Sound.[22] The Washington commercial fisheries generate more than $354 million in annual revenue. Any major oil spill would devastate the region's vibrant coastal economy.

20. *See* Ross Anderson, *10 Years Later, Debate Still Rages Over Effects of Exxon Valdez Oil Spill*, Seattle Times, March 21, 1999.

21. *See* Cohen, *supra* note 14 at v.

22. *See generally* Department of Interior, OCS Study, MMS 88-0084 & 88-0086, *Baseline Socioeconomic Profiles of Coastal Counties in the Washington-Oregon Planning Area* (1988); MMS 91-0056, *Potential Effects of OCS Oil and Gas Exploration and Development on Pacific Northwest Indian Tribes: Final Technical Report* (1991).

D. The Rich and Bountiful Marine Waters of Washington Are Particularly Vulnerable to the Catastrophic Effects of an Oil Spill.

The internal waters of Puget Sound and the Strait of Juan de Fuca harbor some of the world's richest and most diverse marine ecosystems.[23] They attract millions of tourists annually, and are home to, or are visited by, many threatened or endangered species of marine mammals and birds—including several species of salmon, Northern sea lions, humpback whales, and marbled murrelets.[24] The North Puget Sound area also contains a national park, a national marine sanctuary, a national wildlife maritime refuge, and extensive Tribal lands and treaty fishing areas.

Washington's internal waters of Puget Sound and the Strait of Juan de Fuca are particularly susceptible to harm caused by an oil spill. The area is dotted with many small and large islands. There are many long inlets and ship passages can be very narrow. The water exchange through Puget Sound is limited. Because of the narrow straits, miles of low and rocky shoreline, and relatively confined waters that oil tankers must traverse in Washington, the risk of such a spill is increased and the adverse effects of a major spill on the marine environment would be substantially magnified.

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23. *See* 59 Fed. Reg. 24386 (1994); 54 Fed. Reg. 41481 (1989).

24. Other marine wildlife species in this area are protected under the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421, the Migratory Bird Treaty Act, 16 U.S.C. §§ 703, *et seq.*, and the Pacific Salmon Treaty.

II. WASHINGTON POSSESSES THE INHERENT AUTHORITY TO PROTECT ITS WATERS, MARINE LIFE, AND ENVIRONMENT FROM AN OIL SPILL.

A. The Court Has Historically Upheld State Authority to Regulate to Protect and Manage its Marine Environment and to Assure the Safety of its Marine Food Supply.

States have a unique responsibility to citizens to protect their natural resources. Additionally, marine ecosystems produce seafood for human consumption, and states have traditionally had very broad authority to protect and assure the safety of their food supplies.

States are intimately familiar with their local marine resources and the needs of the communities that depend on them. Thus, the state is the regulatory authority that should, and usually does, take the lead in protecting and preserving such resources. With this in mind, however, the federal government shares concurrent authority with states to regulate over matters in admiralty and affecting commercial fishing. The federal authority, if lawfully enacted and within the scope of federal authority, is supreme to state law. Nevertheless, despite the federal government's concurrent authority and the supremacy of federal law, the Court has consistently upheld the inherent authority of states to establish environmental protections to preserve their marine resources and protect the health and safety of their citizens. *See Askew*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). For example, the Court has upheld state laws pertaining to the regulation of fishing and fishing vessels in navigable waters,[25]

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25. *See Skiriotes v. Florida*, 313 U.S. 69 (1941); *Boyside Fish Co. v. Gentry*, 297 U.S. 422 (1936); *Manchester v. Massachusetts*, 139 U.S. 240 (1890).

construction and maintenance of bridges across navigable waterways, opening and closing of draws, the speed of vessels passing through draws,[26] pilotage requirements,[27] enforcement of contracts and attachments even when interrupting interstate commercial voyages,[28] navigation of vessels within state waters,[29] inspections and quarantine of cargoes and passengers,[30] food safety protections,[31] and has even approved state imposed safety equipment requirements on vessels travelling through state waters.[32] These state acts were upheld because no federal law was directly antagonistic to the state action. It is only at that point, the point of direct antagonism, that state authority over its resources and marine environment yields to federal preemption. Short of such a direct conflict, the state regulation should be upheld.

B. Washington Possesses the Inherent Authority to Impose Regulations Aimed at Preventing Catastrophic Oil Spills.

The principal limitation placed on a state's exercise of its police powers is the U.S. Constitution and our system of federalism. State police powers are exceedingly broad. Courts

26. *See Escanaba Co. v. Chicago*, 107 U.S. 678 (1883).

27. *See Olsen v. Smith*, 195 U.S. 332 (1904); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

28. *See The Winnebago*, 205 U.S. 354 (1907).

29. *See Clyde Mallory Lines v. State of Alabama ex rel. State Docks Commission*, 296 U.S. 261 (1935); *The James Gray*, 62 U.S. (21 How.) 184 (1858).

30. *See Morgan's L & T.R. & S.S. Co. v. Louisiana Bd. of Health*, 118 U.S. 455 (1886).

31. *See Adams v. City of Milwaukee*, 228 U.S. 572, 582-84 (1913).

32. *See Fitch v. Livingston*, 6 N.Y. Sup. Ct. (4 Sandford) 493 (1851) (upholding state law requiring two lights illuminated at night where Congress required "one or more"), *cited with approval in*, *Conway v. Taylor's Executor*, 66 U.S. 603, 621 (1861).

start with the assumption that these historic powers are not superseded unless there is a "clear and manifest purpose of Congress." *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715 (1985) (*quoting Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Such intent is not "implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the State." *Huron*, 362 U.S. at 443. Such a conflict does not exist in this instance.

A state's interest in protecting its natural resources against pollution falls squarely within its police powers. *See Askew*; *Huron*. Congress recognizes that oil spills are a "real and continuing threat to the public health and welfare of the environment." Marva Jo Wyatt, *Navigating the Limits of State Spill Regulations: How Far Can They Go?*, 8 U.S.F. Mar. L.J 1, 1n.1 (*quoting* S. Rep. No. 94, 101st Cong., 2d Sess. 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 723). In the exercise of their inherent power, state and local governments "may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." *Huron*, 362 U.S. at 439. Indeed, great deference is given to state legislation that concerns the safety and welfare of citizens.[33]

The Court even permits the states, in the exercise of their police powers, to exert some extraterritorial effect, as long as such effect is incidental and does not disrupt the uniformity of federal law where uniformity is necessary. *See Huron*, 362 U.S. at 444.[34] For example, in *Glenovich v. Noerenberg*, 346 F. Supp. 1286 (D. Alaska), *aff'd*, 409 U.S. 1070 (1972), the Court upheld an Alaska statute that prohibited the use of a drum or reel in operation of purse seiners and thus required vessels fishing in

33. *See* 1 R. Rotunda, J. Nowak & J. Young, *Constitutional Law* § 12.3, at 631 n.8 (1986).

34. Arguably, the Court held in *Askew* that uniformity is not required in the pollution context of this case.

state waters to refit their vessels with power blocks. The requirement to refit fishing vessels, which admittedly had an extraterritorial effect, was upheld because the equipment requirement posed only a slight and incidental burden on interstate commerce. *Id.* Similarly, in *Clyde Mallory Lines v. State of Alabama ex rel. State Docks commission*, 296 U.S. 261 (1935), the Court held that state regulation of harbor traffic was held to be a valid exercise of state police powers although it incidentally affected interstate and foreign commerce.[35]

With regard to oil tanker regulation in particular, the Ninth Circuit Court of Appeals and the First Circuit Court of Appeals have held that a state may validly develop its own oil pollution control and prevention regulation without disrupting the uniformity of federal law. The First Circuit Court of Appeals considered the matter in *Ballard Shipping Co. v. Beach Shellfish*,[36] and found that the Oil Pollution Act of 1990 ("OPA")[37] presents compelling evidence that "Congress does not view either expansion of liability . . . or enactment of comparable state oil pollution regimes as an excessive burden on maritime commerce." *Ballard Shipping*, 32 F.3d at 631.

Indeed, Congress has looked at the states' role in preventing oil pollution, and decided to permit states to continue to enact their own oil spill prevention measures. Comments on the Senate floor in the debate preceding passage of OPA could not be clearer on this point:

> Each state can continue to provide further protection . . . by imposing higher standards of care in the handling and shipping of oil.

35. *See also Claim of Cassaretakis*, 44 N.E.2d 391 (N.Y.), *aff'd*, 319 U.S. 306 (1942) (holding that in the maritime field, as in the field of interstate commerce generally, a state has power to act in matters of merely local concern that do not require uniform national legislation).

36. 32 F.3d 623 (1st Cir. 1994).

37. 33 U.S.C. §§ 2701-2761.

> — Sen. Baucus, Cong. Rec., Oil Pollution Act of 1990, Aug. 2, 1990, at S 11537.
>
> It [OPA] also preserves the rights of individual states to enact even tougher spill response and prevention measures.
>
> — Sen. Levin, Cong. Rec., Oil Pollution Act of 1990, Aug. 2, 1990, at S 11546.

Consequently, when Congress considered the preemption issue in OPA, it kept intact the "long-standing policy in environmental laws of not preempting state authority and recognizing the rights of states to determine for themselves the best way in which to protect their citizens." S. Rep. No. 101-94, 101st Cong., 1st Sess., at 17-18 (1989), *reprinted in* 1990 U.S.C.C.A.N. at 739-40.

C. Fisheries Regulation Is Illustrative of Congress's Recognition of the States' Integral Role in Protection of their Natural Resources.

The regulation of fisheries in America provides one of the best examples of a regime where federal and state governments not only share regulatory authority, but where Congress recognizes the need for state authority in protecting local resources. Congress has even recently expanded such state authority.

Until 1976, with the passage of the Magnuson Act,[38] fishery management was a matter largely left to state regulation. Prior to 1976, the federal government, although claiming control over fisheries up to twelve nautical miles from its coast in 1966,[39]

38. Pub. L. No. 94-265, 90 Stat. 331 (as amended at 16 U.S.C. §§ 1801-1882) (prior to 1980, this Act was known as the Fishery Conservation and Management Act).

39. *See* Eldon V.C. Greenberg & Michael E. Shapiro, *Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform*, 55 S. Cal. L. Rev. 641, 648-649 (1982) (citing Bartlett Act, Pub. L. No. 89-658, 80 Stat. 908 (1966) (repealed 1977)).

and possessing broad powers to regulate commercial fisheries under the U.S. Constitution,[40] nevertheless limited its role to that of a silent partner.[41] This absence of federal action meant that the states, acting under their police powers, "were the only governmental units with comprehensive fishery management programs" covering any waters, including offshore waters, and state regulation often extended beyond the state's territorial three-mile limit.[42] Recognizing the benefits of state authority in matters of local concern, the Alaska Supreme Court observed that "the continued abstention from federal regulation of fishing in territorial waters, despite constitutional power to do so, confirms the wisdom of the traditional approach of local, non-uniform management of fisheries resources." *State v. Bundrant*, 546 P.2d 530, 539 (Alaska 1976).

With the passage of the Magnuson Act, Congress altered the traditional balance of fishery management, basing such management on a much-increased federal presence and delineation of the boundary between state and federal waters. However, the Magnuson Act preserved a place for state regulation of fisheries by including a savings clause and

40. *See, e.g.*, U.S. Const. art. I, § 8, cl. 3 (commerce power); U.S. Const. art. II, § 2, cl. 2. (treaty power).

41. *See* Greenberg & Shapiro, *supra* note 39, at 641-642; Arthur J. Tassi, *Fishery Conservation and Management Act of 1976: An Accommodation of State, Federal, and International Interests*, 10 Case W. Res. J. Int'l. L. 703, 705 n.5 (1978) ("Until enactment of the FCMA in 1976, the Federal Government did no more than act as a passive partner or custodian of the [nine-mile] contiguous zone beyond the state's territorial three-mile limit.").

42. *See* Tassi, *supra* note 41, at 704 n.5; Greenberg & Shapiro, *supra* note 39, at 649; *see also State v. Bundrant*, 546 P.2d 530, 539 (Alaska 1976) (upholding state prosecution of crabbing regulations even though defendants were not citizens of the state or arrested within state waters); *Glenovich v. Noerenberg*, 346 F. Supp. 1286 (D. Alaska), *aff'd*, 409 U.S. 1070 (1972).

recognizing a state's right to regulate beyond state boundaries those vessels licensed under its laws. Thus, even though states held less control over fisheries than prior to passage of the Magnuson Act, Courts still recognized the integral role of states in protecting local resources, and routinely upheld state regulations. In many cases, states could regulate fisheries in the exclusive economic zone (hereinafter "EEZ") where no federal regulations covering the fishery existed, or where state law did not actually conflict with an existing federal management plan or did not frustrate the intent of federal management.[43]

Most recently, states have gained increased authority over fisheries management. Congress reconsidered the shared state-federal fishing authority in the 1996 Amendments to the Magnuson Act, and expanded state authority to regulate fishing within the EEZ.[44] The amendments preserved existing state authority over vessels registered under state laws and gave states the power to regulate *any* vessel outside of state boundaries when the management plan for the fishery in which the vessel was operating delegated responsibility to the state, and the state's regulations are not inconsistent with the plan.[45] State regulations may be more stringent than existing federal regulations. Indeed, in the debate over those amendments, when asked whether state regulators were permitted to impose requirements more stringent than federal regulations, Senator Stevens (the bill's author)

43. *See, e.g., State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984) (allowing state regulation of king crab harvesting in the EEZ where no federal plan had been promulgated); *People v. Weeren*, 607 P.2d 1279 (Cal. 1980) (upholding state penal jurisdiction over defendant who used a state-licensed vessel to take swordfish in EEZ in violation of state regulations and no federal regulatory plan for swordfish had been implemented).

44. *See* 16 U.S.C. § 1856(a)(3).

45. *See* 16 U.S.C. § 1856(a)(3)(B).

replied with a resounding yes, so long as the state regulations were not antagonistic to the intent of federal management.[46]

Congress recently re-emphasized the important role of state management in fisheries by passing legislation concerning the Atlantic coast fishery. Prior to passage of the Atlantic Coast Fisheries Cooperative Management Act (hereinafter "ACFCMA")[47] in 1993, disjointed management had led to poor regulation of fisheries in the Atlantic coast region.[48] Upon considering the matter, Congress found that responsibility for management of Atlantic coast fisheries should lie with the states,[49] and provided, among other things, for state authority to enact complementary fishing regulations in federal waters.[50]

Consequently, under both the Magnuson Act Amendments and ACFCMA, Congress articulated its intended purpose of increasing state authority beyond state boundaries over an activity integrally affecting state resources. Congress has recognized the states' unique responsibility and perspective in designing the best methods for protecting their resources.

D. Congress Not Only Recognizes the States' Integral Role in Protecting their Natural Resources, but Has Also Expanded that Authority.

Regulating oil tankers travelling through internal waters in order to protect state marine resources and assure food safety is in many ways no different than state fisheries regulation.

46. *See* 142 Cong. Rec. S 10,911 (1996) (Statement of Sen. Stevens)); *see also* 16 U.S.C. § 1856(a)(3)(B).

47. 16 U.S.C. §§ 5101-5108.

48. *See* Erik T. Barstow, Comment, *American Lobster Fishery Management under the Atlantic Coastal Fisheries Cooperative Management Act: an Attempt at Cooperative Fishery Jurisdiction*, 4 Ocean and Coastal L.J. 113, 124 (1999).

49. *See* 16 U.S.C. § 5101(a)(4).

50. *See* 16 U.S.C. § 5103(b).

Congress has in fact expressly reserved a place for state action.[51] Congress has also recognized the right of states to impose more stringent, protective standards.[52] Similarly, Congress's understanding of the states' paramount interest in protecting their own natural resources — whether from degradation by pollution or through poor fishing practices — underlies the preservation of state authority in this case.

It stands to reason that protection of precious state coastal and marine natural resources would include state involvement in the regulation of activities affecting its resources. Indeed, Congress has enacted additional legislation affirming a state's responsibility to regulate and protect its own coastal resources, including the Submerged Lands Act[53] and the Coastal Zone Management Act ("CZMA").[54] In the Submerged Lands Act, Congress expressly provides States with concurrent authority to regulate activities within their navigable waters. The authority presumably includes regulation of vessel traffic and extends that authority to "that portion of the Continental Shelf which would be within the boundaries of such State if extended seaward to the outer margin of the shelf." H. Rep. No. 215, 83rd Cong., 1st Sess. 2 (1953), *reprinted in* 1953 U.S.C.C.A.N. 1385, 1406; *see United States v. California*, 436 U.S. 32, 39 (1978). To give states an added incentive to participate in the coastal zone management program, CZMA also stipulates that federal activities within respective coastal management zone boundaries be, to the maximum extent feasible, consistent with approved state CZM programs.[55] This provision is a kind of

51. *See* 33 U.S.C. § 2178(a), (c).

52. *See supra* (Statements of Senators Baucus and Levin).

53. 43 U.S.C. §§ 1311, *et seq.*

54. 16 U.S.C. §§ 1451, *et seq.*

55. *See* 16 U.S.C. § 1456. Washington's Shoreline Management Act, RCW 90.58, was the first state legislation under CZMA to receive federal approval.

reverse preemption that assures states that actions by the federal government will be consistent with the state's plan. Indeed, for nearly every federal Act affecting coastal protection, tidelands, waters, and resources, Congress has included a provision for shared state management. Thus, as with fishery regulation, any effort made by a state to protect its environment and marine resources from catastrophic oil spills should be presumed to be a valid exercise of state police powers unless and until the federal government expressly preempts the field or institutes a specific regulation that actually conflicts with state law.

III. PUBLIC POLICY SUPPORTS THE PRESERVATION OF STATE AUTHORITY IN PROTECTING THE LOCAL MARINE ENVIRONMENT AND COASTAL COMMUNITIES FROM THE RISK OF CATASTROPHIC OIL SPILLS.

A. The Economic Burden of Washington's BAP Safety Regulations on the Tanker Industry Is *De Minimis* when Compared to the Economic Costs of a Major Oil Spill.

Intertanko asserts that the cost of complying with Washington's BAP regulations imposes an undue burden on interstate or foreign commerce. The record before the District Court belies Intertanko's assertions. The cost of compliance represents at most 1.0 - 2.4% of the total yearly operating budget for its tankers:

> [T]he average annual costs for the larger tankers importing oil into Puget Sound (which are most likely to represent the bulk of vessels) range between $13.6 million and $19 million for U.S. tankers (which are the majority of tankers calling at Puget Sound) and between $8.4 million and $12 million for non-U.S. flag tankers. Thus, even if the cost of the BAP rules were double Intertanko's claim . . . these costs would constitute between 1% and 2.4% of the tanker's annual total operating *costs*. Since in fact many of the BAP compliance costs would not be repeated each year (such as the $80,000 installation of the tow package), the actual impact would be far less – probably less than one percent.[56]

Intertanko also gives short shrift to the huge costs of cleanup after any major oil spill (in the billions for the *Exxon Valdez*) — costs falling not just on the oil industry but also on the shoulders of many other individuals.

In this brief, *Amici* have described some of the costs to the fishing industry caused by just one recent major oil spill. Commercial fishermen are but one of many sectors economically damaged by any major oil spill. Tourism, recreational fishing, acquaculture and many other interests also are affected greatly. As the *Exxon Valdez* spill demonstrates, some of the ecological damage may take decades to heal. The potentially huge economic and ecological damage caused by major oil spills, plus the increased risks of a similar incident occurring in the near future as a result of more and more vessel traffic plying treacherous waters, illustrate the substantial need for allowing the sort of preventative measures taken by the State of Washington.

Aside from the staggering cost of a spill to fishing communities and local businesses, the costs of an oil spill to the tanker industry itself cannot be overlooked. Such costs include response costs incurred immediately after an accident. As one poignant example, Exxon spent an estimated $20 million in an effort to save 350 sea otters damaged by the *Valdez* oil spill.[57] Of the 350, only 220 survived at an estimated cost of

56. Affidavit of Arthur McKenzie, at 4 (September 27, 1996).

57. *See* Cohen, *supra* note 14, at 92.

$89,000 apiece.[58] Yet the $20 million spent by Exxon to treat sea otters after the accident was one of the smallest response costs borne by the industry — costs which totaled nearly $2 billion.[59] Adding the $2 billion in response costs to the $900 million state settlement and the $5.3 billion jury award against Exxon for the *Valdez* spill begs the question why the oil tanker industry refuses to comply with the strictest prevention and safety standards in order to prevent a similar spill. With companies like Exxon boasting amazing profits — $137 billion in sales and $8.5 billion in profits in 1997[60] — the fact that these companies shy away from paying just a little bit more in operating costs to greatly increase tanker safety is remarkable.

Apparently, however, Intertanko's members would rather gamble that they will always be able to avoid a similar catastrophic oil spill in the future. The long history of oil spills certainly suggests otherwise. Washingtonians, commercial fishermen, coastal communities, Native Americans, and others who depend on the marine food resources that are most vulnerable to oil spill damage disagree with Intertanko's policy of playing "Russian Roulette" with their personal safety and their livelihood. So should the Court.

B. Washington's BAP Safety Regulations Will Likely Succeed in Reducing the Risk of Catastrophic Oil Spills in State Waters.

The *Exxon Valdez* spilled more oil than any other single tanker accident in U.S. history. Yet, the catastrophe caused by the *Exxon Valdez* is certainly not an isolated incident, as indicated above. When the Washington Legislature took a hard look at what could be causing so many devastating accidents in

58. *Id.*

59. *See* Ross Anderson, *Appeal of $5 Billion Fine Reopens Valdez Battle*, Seattle Times, May 2, 1999.

60. *Id.*

local waters, it found human error to blame in almost every case. Moreover, concerns about human error are magnified when considering the treacherous conditions of Washington's local waters. Washington is well known for seasonal heavy fog and inclement weather with significant traffic congestion at the mouth of the Strait of Juan de Fuca, compounded by traffic from commercial and recreational fishing vessels and ferry passengers.[61]

Washington's BAP safety regulations directly address the major areas of human error associated with tanker accidents: training, operation, personnel, and management policies. The BAP safety requirements specifically target human activities on board oil tankers and seek to prevent accidents caused by human error. The Washington Legislature adopted the BAP safety regulations with considerable evidence before it, compiled by the Coast Guard and others that participated in the drafting of the regulations, that these regulations would likely be effective in addressing the problems of human error. Thus, the BAP safety regulations only serve to further, rather than frustrate, the objectives of Congress promoted by OPA.

CONCLUSION

Through enactment of the BAP safety regulations, Washington is continuing in the tradition of regulating for the benefit of its citizens and local communities. These regulations will help to reduce the risk of and prevent catastrophic oil spills caused by tankers traveling through Washington's internal waters. They seek to preserve the state's fragile marine ecosystem, prevent economic devastation to the state's important commercial fishing industry, protect the safety of seafood consumers, and protect the livelihood of local coastal communities. Like the tug regulations that the Court upheld in

61. *See* United States Coast Guard Volpe Transp. Center Study (1997).

Ray, Washington's BAP safety regulations are also needed because of the "peculiarities in the local waters that call for special precautionary measures."[62]

All things considered, it is far easier for the oil tanker industry to absorb the minimal costs of oil spill prevention than it is for the environment and the fragile marine ecosystems to absorb spilled oil. *Amici* respectfully request that the Court uphold Washington's efforts to protect its environment, fishing economy, seafood, and people from this "insidious form of pollution." *Askew*, 411 U.S. at 329.

Respectfully submitted,

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62. *Ray v. Atlantic Richfield*, 435 U.S. 151, 171 (1978).

APPENDIX

APPENDIX — PACIFIC COAST FEDERATION OF FISHERMAN'S ASSOCIATIONS MEMBERS

Commercial Fishermen of Santa Barbara, Inc.

Commercial Fishermen's Organization of Morro Bay

Crab Boat Owners' Association

Del Norte Fishermen's Marketing Association

Fishermen's Marketing Association of Bodega Bay

Salmon Trollers' Marketing Association

Half Moon Bay Fishermen's Marketing Association

Humboldt Fishermen's Marketing Association

Moss Landing Commercial Fishermen's Association

Port San Luis Commercial Fishermen's Association

Santa Cruz Fishermen's Marketing Association

Golden State Trollers Association

Small Boat Commercial Salmon Fishermen's Association

Trinidad Bay Fishermen's Marketing Association

Southern California Trawlers Association

Golden Gate Fishermen's Association

Appendix A

Salmon for All

Federation of Independent Seafood Harvesters (FISH)

United Fishermen of Alaska

Ventura Commercial Fishermen's Association

Central California Longline Association

Washington Trollers Association

Western Fishboat Owners' Association

Monterey Fishermen's Marketing Association

Shelter Cove Commercial Fishermen's Association

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SUPREME COURT, U.S.

Nos. 98-1701 & 98-1706

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

-and-

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

v.

GARY LOCKE, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County; K. CARL LONG, Prosecutor of Skagit County; JAMES H. KRIDER, Prosecutor of Snohomish County; NORMAN MALENG, Prosecutor of King County; NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL and OCEAN ADVOCATES,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* PRINCE WILLIAM SOUND REGIONAL CITIZENS' ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

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Richard Townsend and Burr Heneman, *The Exxon Valdez Oil Spill: A Management Analysis* (Center for Marine Conservation 1989) 6

BRIEF OF *AMICUS CURIAE* PRINCE WILLIAM SOUND REGIONAL CITIZENS' ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS[1]

The Prince William Sound Regional Citizens' Advisory Council respectfully submits this brief as *amicus curiae* in support of the Respondents.

INTEREST OF AMICUS CURIAE

The Prince William Sound Regional Citizens' Advisory Council (hereafter "RCAC") is a non-profit corporation organized under the laws of the State of Alaska and incorporated on December 26, 1989. RCAC was created in the months following the *Exxon Valdez* oil spill, after representatives of Prince William Sound commercial fishing interests approached Alyeska Pipeline Service Company[2] (hereafter "Alyeska") and persuaded Alyeska of the need for citizen oversight of the Valdez oil terminal and the tanker operations within Prince William Sound. RCAC was initially comprised of representatives from the municipalities that were affected by the *Exxon Valdez* oil spill, as well as representatives from environmental, Native, and commercial fishing organizations.

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1. This Brief was authored solely by Avrum M. Gross and Susan A. Burke. No person or entity other than the Prince William Sound Regional Citizens' Advisory Council made a monetary contribution to the preparation or submission of the Brief.

2. Alyeska Pipeline Service Company is the operator of the Trans-Alaska Pipeline as well as the marine terminal located in Valdez, Alaska, from which North Slope crude oil is loaded onto tankers for transport to refineries outside of Alaska. It is a corporation all of whose shares are held by the major oil companies producing and shipping oil from Alaska's North Slope.

On February 8, 1990, RCAC and Alyeska entered into a contract, which will remain in effect as long as oil continues to flow through the Trans-Alaska Pipeline System. Under the contract Alyeska provides substantial annual funding enabling RCAC to carry out certain contractual responsibilities for the benefit of Alyeska and the public. Those obligations include monitoring oil tanker operations in Prince William Sound, providing local and regional input into the design of mitigation measures for oil spills, reviewing oil spill response and prevention plans and the capabilities of the terminal and tankers to comply with those plans, undertaking studies relating to spill prevention and mitigation of environmental impacts of terminal and tanker operations, and increasing public awareness of the actual and potential environmental impacts of terminal and tanker operations.

The existence of a Regional Citizens' Advisory Council for Prince William Sound was subsequently required by federal law. Immediately after the catastrophic spill in March 1989, Congress began work on legislation aimed at preventing such spills from occurring again. The result was the Oil Pollution Act of 1990.[3] Section 5002 of OPA 90 mandates the establishment of regional Citizens' monitoring groups for Prince William Sound and Cook Inlet. Section 5002 begins by outlining a number of Congressional findings, including that "many people believe that complacency on the part of the industry and government personnel was one of the contributing factors of the Exxon Valdez oil spill,"[4] that "the present system of regulation and oversight of crude oil terminals has degenerated into a process of continual

3. Public Law 101-380 (August 18, 1990) (hereafter "OPA 90").

4. OPA 90, § 5002(a)(2)(B).

mistrust and confrontation,"[5] that "a mechanism should be established which fosters the long-term partnership of industry, government, and local communities in overseeing compliance with environmental concerns in the operation of crude oil terminals,"[6] and that "only when local citizens are involved in the process will the trust develop that is necessary to change the present system from confrontation to consensus."[7] Section 5002(d) then establishes a Regional Citizens' Advisory Council for Prince William Sound. Section 5002(o) provides that in lieu of the Council established under Section 5002(d), an alternative voluntary advisory council may perform the functions of the Prince William Sound citizens' oversight program if Alyeska provides a minimum level of funding under a contract with a citizens' advisory committee for the duration of the operation of the Trans-Alaska Pipeline System and if the President annually certifies that the citizens' advisory committee "fosters the general goals and purposes of this section and is broadly representative of the communities and interests in the vicinity of the terminal facilities and Prince William Sound." Each year since the enactment of OPA 90, RCAC has been certified as the alternative voluntary advisory group to fulfill the citizens' oversight and monitoring duties established in OPA 90.[8]

5. OPA 90, § 5002(a)(2)(G).

6. OPA 90, § 5002(a)(2)(D).

7. OPA 90, § 5002(a)(2)(H).

8. RCAC's current membership consists of two classes — voting members and ex-officio, non-voting members. Its voting members are representatives nominated by the following

(Cont'd)

Since its formation in 1989 and during its nearly 10 years as the official OPA 90 citizens' monitoring group for Prince William Sound, RCAC has been a leader in the area of tanker monitoring and oil spill prevention. RCAC closely monitors the operations of the Alyeska oil terminal in Valdez as well as the operations of tankers while in transit through Prince William Sound and while berthed at the Alyeska terminal. RCAC has been actively involved in reviewing and commenting on the oil spill contingency plans prepared by both Alyeska, as operator of the Valdez terminal, and the tankers that transit Prince William Sound.[9] It has also conducted major studies relating to

(Cont'd)
organizations and municipal governments: The Alaska State Chamber of Commerce, Cordova District Fishermen United, Chugach Alaska Corporation, City of Cordova, City of Homer, City of Kodiak, City of Seldovia, City of Seward, City of Valdez, City of Whittier, Kenai Peninsula Borough, Kodiak Village Mayors Association, Kodiak Island Borough, Prince William Sound Aquaculture Corporation, Community of Chenega, Community of Tatitlek, Alaska Wilderness Recreation and Tourism Association, and the Oil Spill Region Environmental Coalition. The following organizations have designated an individual to act as an ex-officio, non-voting member of RCAC: The United States Environmental Protection Agency, the United States Coast Guard, the United States National Oceanic and Atmospheric Administration, the United States Forest Service, the United States Department of the Interior, the Alaska Department of Environmental Conservation, the Alaska Department of Fish and Game, the Alaska Department of Natural Resources, and the Division of Emergency Services (Alaska Department of Military and Veterans Affairs), and the Prince William Sound Science Center (including the Oil Spill Recovery Institute established in Section 5001 of OPA 90).

9. Alaska Statutes ("AS") section 46.04.030 prohibits a person from operating an oil terminal facility, a pipeline, an exploration (Cont'd)

tanker operations in Prince William Sound. In 1993 and 1994, for instance, RCAC participated in a two part Prince William Sound Disabled Tanker Towing Study, along with representatives of the Prince William Sound Tanker Association, Alyeska, the Alaska Department of Environmental Conservation and the United States Coast Guard. This study evaluated existing equipment, personnel and procedures for emergency towing of oil tankers in Prince William Sound. The study included the use of computer simulations to assess the capability of existing escort vessels and to examine alternatives that could enhance escort and rescue towing capabilities in a "worst case failure scenario." More recently, RCAC participated in a 1996 study, along with representatives of the Prince William Sound oil shippers, the Alaska Department of Environmental Conservation, and the Coast Guard, to assess the risks associated with oil transportation in Prince William Sound. The Prince William Sound Risk Assessment Project, with a total price tag of over $2,000,000, identified and evaluated the risks under current and proposed risk reduction measures, and developed statistical models by which the efficacy of future risk reduction measures can be evaluated.[10]

(Cont'd)
facility, a production facility or a tank vessel or barge within the State unless the person has an oil discharge prevention and contingency plan that has been approved by the Department of Environmental Conservation and the person is in compliance with the plan. The plans must set out in detail the actions that will be taken in the event of a spill, the equipment that will be used, and where that equipment will be located. Contingency plans are also required under federal law. *See* 33 U.S.C. § 1321(j) and 33 C.F.R. § 155.1010.

10. In addition to these major studies involving tanker operations, RCAC has also conducted a number of other scientific (Cont'd)

RCAC does not appear here simply to bear first person witness to the horrors of a catastrophic spill such as the *Exxon Valdez* spill of March 24, 1989. Those horrors have been adequately catalogued elsewhere.[11] RCAC is here because it

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(Cont'd)
studies, both on its own and in conjunction with other organizations, on a wide variety of topics relating to oil spill response and prevention. For example, RCAC has studied the environmental impacts of Alyeska's ballast water treatment facility as well as the impact of oil vapors released into the atmosphere during tanker loading; it has conducted studies of the incidence and trajectory of icebergs in the tanker lanes in and out of Prince William Sound; it annually samples the sediments of Prince William Sound for the presence of hydrocarbons; it has sponsored symposiums dealing with prevention of, and response to, fire hazards on tankers in transit through Prince William Sound and at the Valdez terminal loading berths; it is currently involved in research, in conjunction with the Smithsonian Environmental Research Center, to determine whether aquatic nuisance species (non-indigenous species) are arriving in Prince William Sound via tanker ballast water in order to avoid the type of problems that have occurred in the Great Lakes and San Francisco Bay; and it has prepared planning materials for local communities to deal with the social upheavals that a catastrophic oil spill inevitably brings.

11. The enormous environmental, economic and social impacts of the *Exxon Valdez* spill have been documented in a host of publications. *See*, for example, Stanley D. Rice, et al., editors, *Proceedings of the Exxon Valdez Oil Spill Symposium, held at Anchorage, Alaska, February 2-5, 1993* (American Fisheries Society, Bethesda, Maryland 1996); Richard Townsend and Burr Heneman, *The Exxon Valdez Oil Spill: A Management Analysis* (Center for Marine Conservation 1989); Ernest Piper, *The Exxon Valdez Oil Spill, Final Report, State of Alaska Response* (Alaska Department of Environmental Conservation 1993); *Economic, Social, and Psychological Impact Assessment of the Exxon Valdez Oil Spill, Prepared for Oiled Mayors Subcommittee, Alaska Conference of Mayors* (Impact Assessment, Inc., November 15, 1990).
(Cont'd)

believes the Court's decision in this case will have a major impact on the degree to which similar spills can be prevented in the future. The case calls into question the authority of State governments, including the State of Alaska, to adopt local rules governing certain aspects of oil tanker operations within their jurisdictions. Petitioner Intertanko argues that States may not adopt rules that affect tanker operations in any manner whatsoever if there is a federal statute or regulation that deals with the same subject matter. The sweeping concept of federal preemption that Intertanko urges this Court to adopt would invalidate nearly all types of State regulation of local tanker operations, regardless of whether the State rules are identical to the federal standards, whether the State rules deal with matters that are primarily of local concern, and whether State rules that impose additional requirements are compatible with the federal standards. The Respondents argue that there is no conflict here between State and federal authority and that applicable federal law must be read as authorizing the exercise of State police power to insure the safety of the coastal environment.

(Cont'd)

Even after ten years, Prince William Sound has yet to recover fully from the *Exxon Valdez* oil spill. In a March 1999 publication, the *Exxon Valdez* Oil Spill Trustee Council reported that of the various injured resources, only bald eagles and river otters had fully recovered. Other species, including black oystercatchers, clams, Pacific herring, mussels, marbled murrelets, pink salmon, sockeye salmon, and sea otters were still "recovering." Listed as "not recovering" were killer whales, harbor seals, harlequin ducks, pigeon guillemots, and cormorants. Also listed as not fully recovered were recreation and tourism uses in Prince William Sound, Alaska Native subsistence resources, commercial fishing, and passive uses. *Exxon Valdez Oil Spill Restoration Plan, Update on Injured Resources and Services*, at 3 (Exxon Valdez Oil Spill Trustee Council, March 1999).

Because of its unique position as a citizens' monitoring organization, RCAC brings to this discussion the outlook of the residents of Alaska who have seen first hand the consequences of a major oil spill. RCAC believes that the United States Congress, in enacting OPA 90, shared RCAC's concern that it was not enough to have only the federal government regulating oil tanker operations. Congress intended that State governments, with specific local knowledge of coastal marine environments, were to play a significant and substantive role in the exercise of their police power in order to supplement federal regulation of tanker operations. So long as the State rules are not in actual conflict with federal requirements, there is no reason for States to be precluded from adopting and enforcing those rules.

SUMMARY OF ARGUMENT

Preemption of State authority to adopt regulations relating to the operation of tankers in State waters depends on Congressional intent. Section 1018 of OPA 90 specifically disclaims any intent to preempt the power of States to impose additional requirements "with respect to" or "relating to" the discharge of oil. This disclaimer should be construed broadly so as to allow State regulation of oil tanker operations for several reasons. First, a broad construction of the disclaimer is consistent with the impetus that gave rise to OPA 90 in the first place — the inadequacy of federal regulatory efforts in Prince William Sound that contributed in part to the *Exxon Valdez* oil spill. Additional participation by States and citizen groups like RCAC was encouraged, not prohibited by OPA 90. Second, the line that Petitioner Intertanko seeks to draw between valid State authority to regulate the efforts of oil tankers to clean up after a spill and invalid State authority to regulate tanker operations to

prevent spills is illusory. Since Section 1018 of OPA 90 clearly allows States to adopt regulations affecting the operations of tankers in the area of spill response, that Section by implication must also allow State regulation of integrally related oil tanker operations for the purpose of preventing spills, so long as the State regulations are not in actual conflict with analogous federal laws. Finally, Congressional intent should not be implied here to preempt State regulation, because total preemption will disrupt a successful partnership between the United States Coast Guard and State authorities that has developed since the *Exxon Valdez* oil spill and that has led to safer transportation of oil throughout the coastal waters of the United States.

ARGUMENT

I.

SECTION 1018 OF OPA 90 SPECIFICALLY ALLOWS STATES TO ADOPT OPERATING STANDARDS FOR TANKERS IN STATE WATERS THAT EXCEED FEDERAL STANDARDS.

A. Introduction

All parties in this case recognize that the federal government has the authority to preempt State regulation of particular matters by expressly forbidding State action. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Preemption may also occur when the Congress acts to so occupy a field with federal legislation "as to make reasonable the inference that Congress left no room for the States to supplement it." *Fidelity Federal Savings & Loan Association v. De la Cuerta*, 458 U.S. 141, 153 (1982) (*quoting Rice v.*

Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Finally, preemption can occur when "compliance with both state and federal law is impossible or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *California v. ARC American Corp.*, 490 U.S. 93, 100-01 (1989) (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

All of these preemption principles ultimately depend on the intent of Congress. The parties and *amici curiae* here have focused on Congressional intent and have attempted to demonstrate its existence or lack of it from a variety of sources. A basic element in all of those discussions is just how this Court should interpret OPA 90, and specifically, Section 1018 of that Act, which provides:

> (a) PRESERVATION OF STATE AUTHORITIES . . . Nothing in this Act or the Act of March 3, 1851 shall
>
> (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to
>
> (A) the discharge of oil or other pollution by oil within such State . . .
>
> . . . .
>
> (c) ADDITIONAL REQUIREMENTS AND LIABILITIES; PENALTIES. Nothing in this Act, or the Act of March 3, 1851 . . . shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof

> (1) to impose additional liability or additional requirements; or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;
> relating to the discharge or substantial threat of a discharge, of oil.

Intertanko argues that both the placement of this disclaimer in Title I of OPA 90 and certain legislative history surrounding the passage of OPA 90 suggest that Congress intended a narrow reading of this disclaimer — one that pertains only to State response to an actual spill, and to liability and damages for an actual or threatened spill. The Ninth Circuit Court of Appeals looked at the clear language of the provision and adopted a much broader interpretation, one that allows States to adopt oil spill prevention regulations pertaining to the operation of vessels in State waters that exceed federal requirements.[12]

The basic principles of federal preemption were discussed at length in the decision below and will be adequately presented by the parties to this case. RCAC can add little to that general discussion. RCAC, as the citizens' monitoring organization mandated by Section 5002 of OPA 90, can, however, provide some specific insights into that Act that have relevance to the interpretive issue before the Court. The first pertains to the atmosphere that surrounded the passage of OPA 90; the second relates to the internal consistency of the Act. Both bear on the interpretation of OPA 90 and specifically on the scope of the disclaimer in Section 1018 of the Act, which all parties recognize play a key role in determining Congressional intent in this case.

12. *The International Association of Independent Tanker Owners (Intertanko) v. Locke*, 148 F.3d 1053 (9th Cir. 1998).

B. Section 1018 Must Be Interpreted in Light of the Impetus for the Enactment of OPA 90 as a Whole.

OPA 90 had its genesis in the most catastrophic oil spill in the nation's history — one that devastated the pristine marine environment of Prince William Sound, a major fishing ground and tourism destination. The spill was caused not only by errors and omissions by the *Exxon Valdez* master and crew, but also from a nearly complete failure by federal authorities, principally the Coast Guard, to fulfill existing statutory responsibilities. For instance, the National Transportation Safety Board's inquiry into the *Exxon Valdez* spill concluded that:

> The Coast Guard was not maintaining an effective VTS [Vessel Traffic System] in Prince William Sound at the time of the EXXON VALDEZ grounding.

The board went on to note:

> . . . [T]he VTC [Vessel Traffic Control] watchstander had ample time to call the vessel to ascertain the intentions of the navigation watch. Any inquiry from the VTC regarding the vessel's intentions probably would have alerted the third mate to turn earlier or to use more rudder. A subsequent follow-up inquiry from the VTC would surely have alerted him to the fact that his vessel could be standing into danger and that a sharp right turn back toward the traffic lanes was needed. Any action by the third mate to turn earlier or to use more rudder could have been sufficient to steer the vessel clear of Bligh Reef.[13]

The Regional Citizens' Advisory Councils were established by Congress for the specific purpose of combatting what "many people" thought was "complacency" on the part of the government and industry in monitoring tanker activities.[14] The councils established in OPA 90 are charged with duties specifically related to crude oil tanker operations. For example, the councils' functions include recommending "site specific regulations intended to minimize the impact of . . . crude oil tankers' operations," suggesting "modifications of crude oil tanker operations and maintenance in Prince William Sound and Cook Inlet intended to minimize the risk and mitigate the impact of oil spills," and suggesting modifications to "oil spill prevention and contingency plans . . . for crude oil tankers in Prince William Sound and Cook Inlet intended to prevent and respond to an oil spill."[15] These duties were obviously not imposed on the citizens' councils established in OPA 90 as a reflection of Congress's satisfaction with the job that federal agencies had previously done in monitoring and controlling tanker operations in Prince William Sound. They were imposed because federal regulation, in and by itself, had failed in its most basic purpose — to prevent a spill. Congress sought not to protect federal authority in OPA 90

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13. *Marine Accident Report, Grounding of the U.S. Tankship Exxon Valdez on Bligh Reef, Prince William Sound near Valdez, Alaska, March 24, 1989*, National Transportation Safety Board, PB90-916405, NTSB/Mar-90/09, at page 153.

14. OPA 90, § 5002(a)(2)(B).

15. OPA 90, § 5002(d)(6)(F).

so much as to insure that there were *other* bodies in addition to federal regulatory agencies that would play some role in this crucial area. It is consistent with that Congressional intent that States, which have particular local concerns, play a major role as well.[16]

It is an established principle of legislative interpretation that in ascertaining the intent of Congress, this Court will look to all the circumstances that surround the passage of an act.[17] Had OPA 90 been enacted to insure the exclusivity of federal regulation — to insulate it from other voices because the effectiveness of federal regulation had been or would be jeopardized by additional State's regulation — Intertanko's argument for a narrow construction of Section 1018 might

16. Additional evidence of Congressional intent to involve local authorities is found in Section 5002(e) of OPA 90, which establishes an Oil Terminal Facilities and Oil Tanker Operations Association, composed of one member designed by oil tanker operators, one by the terminal facility, one by the federal government, and one by the State of Alaska. The purpose of the Association is "to provide a forum" to "discuss and make recommendations governing all permits, plans, and site specific regulations governing the activities and actions of the terminal facilities . . . and of crude oil tankers calling at those facilities." An Association for Prince William Sound has never been formed, as it is not required when a voluntary alternative citizens' advisory council has been certified under Section 5002(o). But the structure of the Association is, again, clear evidence of Congressional intent to include the State of Alaska in oil tanker regulation.

17. "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived." *United States v. Fisher*, 2 Cranch (U.S.) 358, 386 (1804); and *see Watt v. Alaska*, 451 U.S. 259, 270 (1987), where this Court in interpreting ambiguous legislation discussed the political "impetus" for the proposal before the Congress.

make some sense. In fact, the disclaimer was adopted under circumstances that demonstrated that exclusive federal regulation had proven ineffective. The terms of the disclaimer should be interpreted in that light — to allow those other voices with more urgent and particularized local concerns to be heard, not stifled.

C. A Narrow Construction of Section 1018 Conflicts with States' Conceded Authority to Regulate Oil Spill Response Activities by Oil Tankers.

Section 1018 of OPA 90 specifically authorizes States to impose "additional . . . requirements . . . with respect to the discharge of oil." Intertanko concedes, as does the United States Coast Guard, that this section of law specifically authorizes the States to adopt measures dealing with the response to an oil spill.[18] In Intertanko's view, while States may not in any way impose restrictions on tankers that might *prevent* a spill in State waters, they may impose planning requirements on tankers that will insure that the tankers have the capacity to clean up any oil they spill. Intertanko apparently recognizes that this Court views that kind of authority as part of the traditional power of States to adopt

18. In its Brief on the Merits, Intertanko cites a Coast Guard legal opinion that is "consistent with the positions of Intertanko and the United States." The opinion, as described by Intertanko, "asserts that the States . . . may regulate . . . response." Intertanko Brief on the Merits at 36 n.26. The Petitioners' position on this point is also consistent with a prior decision of this Court that upheld States' authority to require tankers to maintain containment equipment "in the absence of any fatal conflict between the [State and federal] statutory schemes." *Askew v. American Waterway's Operators*, 411 U.S. 325, 337 (1973).

local pollution control measures.[19] Intertanko nonetheless argues that any effort by States to regulate the "primary conduct" of the vessel, as opposed to peripheral issues such as penalties and liabilities, is barred. As Intertanko sees it, Congress has never authorized "a joint or concurrent role for states and local governments in matters relating to standards and requirements affecting the on-board primary conduct of tank vessels or their crews."[20] The problem here is that what Intertanko sees as a clear line of demarcation between valid State requirements imposed on tankers to clean up a spill and invalid State requirements on tankers to prevent the spill in the first place simply does not exist. In both cases, the State requirements will affect tanker personnel and operations, yet Intertanko argues preemption in one area and concedes State authority in the other — a distinction that makes no sense. Since Congress clearly intended for States to have authority to require tanker operators to respond to a spill, it necessarily follows that Congress never intended to preempt State efforts to reach the operations and on-board conduct of tankers with regard to oil spill prevention.

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19. *See, e.g., Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851) (local pilotage requirement upheld); *Kelly v. Washington*, 302 U.S. 1 (1937) (supplemental state safety regulations relating to motor driven tugboats upheld); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (municipal regulation of smoke pollution from vessels upheld). State regulatory regimes that are identical to federal ones have also been upheld against challenges that federal law has preempted State action. *California v. Zook*, 336 U.S. 725 (1949). And *see, Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (State law requiring tankers to carry certain oil spill response equipment not preempted).

20. Intertanko Brief on the Merits, at 11.

The complete interrelationship between prevention and response can be quickly seen by a brief review of the kinds of regulations concerning responses that have been adopted by the State of Alaska. Like the federal government, the State has adopted statutes and regulations requiring every owner and operator of an oil tanker within the State to have and to comply with an approved oil discharge contingency plan.[21] Some of the Alaska requirements relate to oil spill prevention, but some are confined to response, which the United States and Intertanko concede are not preempted by federal law. Many of the response requirements involve some kind of "on board" conduct on the part of the tanker crew. For example, the State of Alaska requires tankers to have access to sufficient lightering equipment and personnel to transfer all oil remaining in damaged cargo tanks and in undamaged tanks if there is a risk of discharge from those tanks.[22] This transfer will inevitably require the assistance of the tanker's crew to accomplish. The same would be true of a State regulation requiring that a vessel discharging oil in State waters must immediately contain the discharge by containment boom or other effective means.[23] The tanker's crew would be required to deploy the boom, and the State's containment requirement regulation would be meaningless

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21. *See* AS 46.04.030(c) and Alaska Administrative Code sections 18 AAC 75.400 through 18 AAC 75.495. *See* 33 U.S.C. § 1321(j) and 33 C.F.R. § 155.1010 for federal contingency plan requirements for tankers.

22. *See* 18 AAC 75.445(d)(6).

23. 18 AAC 75.445(d)(4), for example, requires tanker owners and operators to demonstrate that "sufficient oil discharge response equipment, personnel, and other resources are maintained and available for the specific purposes of preventing discharged oil from entering an environmentally sensitive area . . ."

if the State could not also require the tanker to carry and maintain the containment gear. If Intertanko's theory is correct, it will mean that States will have the impossible task of sorting out which response regulations affect tanker operations and "on-board" crew conduct and which do not. The difficulty of differentiating between the two will lead either to extensive state and federal litigation, or worse, to paralysis on the part of the States to adopt and enforce entirely valid response requirements, for fear of trespassing on what Petitioners claim is the exclusive territory of federal regulation.

All of this conflict and confusion disappears if Section 1018 of OPA 90 receives a broad and literal interpretation, instead of the narrow one proposed by Intertanko. Traditional State activities in the oil spill recovery and response arena will continue, free of the risk of being nullified by a new and overly broad theory of federal preemption. States have always been free to protect their marine environments and OPA 90 confirms that authority — both for oil spill prevention measures and for spill response requirements. Equally important, the lack of any clear line between State regulation of tanker operations for spill response purposes, as opposed to prevention, strongly suggests that Congress intended the disclaimer provisions of Section 1018 of OPA 90 to apply to both spheres of State regulation.

II.

COMPLETE FEDERAL PREEMPTION OF TANKER REGULATIONS MAY JEOPARDIZE EXISTING COOPERATIVE RELATIONSHIPS BETWEEN STATES AND THE FEDERAL GOVERNMENT THAT HAVE BEEN SUCCESSFUL IN REDUCING THE RISK OF OIL TANKER SPILLS IN PRINCE WILLIAM SOUND.

The Coast Guard in recent years has recognized the State of Alaska as a valuable partner in cooperative efforts to prevent oil spills. Since the *Exxon Valdez* spill, the State of Alaska has been fortunate in achieving a high level of cooperation and consultation with local Coast Guard officials having jurisdiction and authority over tanker operations in Prince William Sound. This cooperation has resulted in tanker operation rules for Prince William Sound that have reflected local knowledge and concerns and that have significantly reduced the risks of tanker spills in the Sound. By way of example, Alyeska, as operator of the terminal, recently revised its Vessel Escort and Response Plan for Prince William Sound ("PWS VERP"). The plan, approved by the Coast Guard, was the result of a collaborative effort among the Coast Guard, RCAC, the Alaska Department of Environmental Conservation, tanker owners and operators, and Alyeska's Ship Escort Response Vessel System ("SERVS"). Included in this comprehensive port specific plan for tanker operations in Prince William Sound are detailed procedures for the use of escort vessels, speed restrictions for both ballasted and oil laden tankers at various locations in the Sound, closure rules for high winds and high seas, communications requirements, requirements for

pre-escort conferences, and navigation guidelines in the presence of ice.[24]

It is not unwarranted to assume that the Coast Guard's willingness to involve State officials in its regulatory efforts (such as the development and approval of the Prince William Sound VERP) is in large part a result of the Coast Guard's recognition that the State of Alaska exercises concurrent authority over a number of areas covered in the PWS VERP. A ruling from this Court that the State of Alaska is wholly without that authority might well undermine the Coast Guard's continued willingness to accept the active involvement of the State in its own regulatory efforts. History is replete with instances where those with power and responsibility have refused to share that authority unless compelled to do so. If cooperation breaks down, however, it bodes ill for the future, for on the horizon are other significant problems that clearly would benefit from the cooperative efforts that have existed since the enactment of OPA 90. One of the paramount future concerns in the area of tanker operations, for instance, relates to the imminent advent of double hulled tankers in the Prince William Sound tanker fleet.[25] Current federal law and regulation

24. The plan also requires, among other things, that "deck officers and crew must be familiar with the component parts of the towing package and the method of deployment." The plan goes on to require tankers to carry the "Prince William Sound Towing Package," which is identical to the towing package defined in Alaska regulations for use by vessels berthed at the Valdez terminal. *See* 18 AAC 990(96). The manual goes on to provide that "[e]quivalent towing gear may be substituted with the concurrence of the Alaska Department of Environmental Conservation and SERVS." PWS VERP (reprinted September 1998) at 7-3.

25. 46 U.S.C. § 3703a(c)(4), adopted in OPA 90 provides, "Except as provided in subsection (b) of this section . . . a vessel that has a single hull may not operate after January 1, 2010."

require a minimum of two escort vessels for single hulled tankers.[26] At present there is no federal law requiring escort vessels for double hulled tankers. While double hulled tankers will provide added protection from oil spills, these tankers are not totally invulnerable to having both hulls pierced, particularly in a powered grounding or collision. The Prince William Sound Risk Assessment Project, mentioned above, concluded that, "The single most effective risk reduction measure to date has been the current escort system which effectively reduces potential oil outflows due to groundings."[27] Based on past collaborative efforts, RCAC has every reason to believe that if the Coast Guard addresses the issue of escort vessels for double hulled tankers in Prince William Sound, it will listen to RCAC's and the State of Alaska's concerns and mutually acceptable and wholly consistent State and federal rules will be developed. The Coast Guard will do so, in part at least, because the State of Alaska has the authority to address the issue on its own, should the Coast Guard fail to act. Certainly, vessel escort requirements, based on particular local port hazards, would be no more an intrusion into federal regulation of vessel operations, and would be no more an obstacle to national uniformity, than are clearly valid State pilotage requirements, which have previously been upheld by this Court.[28] Intertanko's position would lead to States being barred entirely from this area of regulation and potentially to a breakdown of federal-state cooperation in this area.

26. OPA 90, § 4116; 33 C.F.R. §§ 168.01(a) and 168.40.

27. *Prince William Sound Risk Assessment*, Final Report, December 15, 1996, Executive Summary at 3.

28. *Cooley, supra* and *see Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

CONCLUSION

RCAC respectfully requests the Court to uphold the right of the State of Washington and other coastal states to adopt and enforce non-discriminatory regulations relating to both oil spill prevention and response capabilities of oil tankers, so long as the regulations are not in actual conflict with federal law.

Respectfully submitted,

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Nos. 98-1701, 98-1706

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In The

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,
v.
GARY LOCKE, Governor of Washington, et al.,
Respondents.

INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Petitioner,
v.
GARY LOCKE, Governor of Washington, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF ALASKA, CALIFORNIA, CONNECTICUT, FLORIDA, HAWAII, ILLINOIS, LOUISIANA, MAINE, MASSACHUSETTS, MISSISSIPPI, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, UTAH, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

Oil spills are "an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent." *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 328–29 (1973). Given the well-publicized history of oil spills in this country over the past 30 years, there is little need to recount here the grave harm that oil spills have caused to the natural resources and economic well-being of the States; it is a disturbing litany of dead birds, fish, and wildlife, oiled marshes, damaged commercial fisheries, and fouled beaches.

Because "sea-to-shore pollution [is] historically within the reach of the police power of the States," *id.*, at 343, the States, in response to the urging of their citizens, have responded to the oil spill threat. Initially, the reaction of many States to the increased oil tanker traffic in their waters and the consequent spills was the enactment of legislation providing for cleanup responsibility, liability in damages, civil penalties, and criminal fines. With the passage of time, however, as the number of spills mounted, the States have increasingly turned to prevention of oil spills as a surer way to avoid damages that oftentimes are exceedingly difficult to remediate.

California's experience is typical. The largest portion of crude oil arriving at California refineries comes by sea, resulting in heavy tanker traffic.[1] In January 1971, two tankships, the *Oregon Standard* and the *Arizona Standard*, collided in San Francisco Bay near the Golden Gate Bridge. Eight hundred thousand gallons of oil were spilled into the bay. Shortly thereafter, the California Legislature enacted section 293 of the California Harbors and Navigation Code, providing for strict liability for oil spills.[2] In October 1984, the outbound tankship *Puerto Rican* exploded and caught fire a few

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1. Currently, of the oil shipped to refineries in California, 50 percent—14.6 billion gallons per year—comes by tanker from Alaska or foreign sources.

2. 1971 Cal. Stat. ch. 1763, p. 3811, § 1.

miles outside the Golden Gate. The Coast Guard directed the crippled ship to a point south-by-southeast of the Farallon Islands, where it broke up, the stern sinking to the bottom. One and one-half million gallons of petroleum product were spilled within the Point Reyes-Farallon Islands National Marine Sanctuary. Little more than a year later, the tank barge *Apex Houston*, in transit from Martinez to Long Beach, spilled over 25,000 gallons of oil, killing or damaging 10,000 seabirds from San Francisco to Big Sur, including Marbled Murrelets, a threatened and endangered species. Following these two incidents, legislation was passed that widened the range of recoverable damages and costs for oil spills, and provided for the award of attorney's fees and expert costs to the prevailing plaintiff.[3]

In 1989, the *Exxon Valdez* tragedy occurred in Prince William Sound, Alaska. It was followed shortly by another major spill, again in California. In February 1990, the tankship *American Trader* grounded on its own anchor while attempting to moor at a marine terminal offshore Huntington Beach. The ship spilled 400,000 gallons of oil, causing extensive injury to fish and birds, damaging the local commercial fishing industry, and coating some 14 miles of beaches and shoreline with oil, resulting in the forced closure of local harbors and some of Southern California's finest beaches for as long as a month.

California's legislative reaction to these two spills was the passage of the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act of 1990.[4] For the first time, the California Legislature focused prominently on oil spill prevention, not just response and liability. To that end, the act required the adoption of regulations concerning various matters, including

3. Cal. Harb. & Nav. Code § 294, 1986 Cal. Stat. ch. 1498, § 2.

4. 1990 Cal. Stat. ch. 1248, codified at Cal. Gov. Code §§ 8574.1-8574.10, 8670.1-8670.72, and Cal. Pub. Res. Code §§ 8750-8760.

tugboat escorts, marine terminals, and oil spill contingency plans for vessels and marine facilities; required the preparation and approval of operations manuals for marine terminals and facilities; required the inspection of vessels for "compliance with relevant federal law and the [act]"; required the inspection of marine facilities; implicitly recognized the exclusive role of the federal government in matters of vessel design and construction, including double hulls; and acknowledged the important role that the federal government plays in preventing and responding to oil spills, stating that "it is in the best interests of the state to coordinate with agencies of the federal government, including the Coast Guard, to the greatest degree possible."[5]

The subsequently enacted regulations have two aspects. First, they in large part incorporate federal spill prevention standards into state law, thereby bringing to bear an additional cadre of trained state inspectors to assist Coast Guard enforcement personnel, who are stretched thin. This cooperative inspection effort, which covers vessels and marine oil transfers, including bunkering and lightering, is memorialized in a Memorandum of Agreement signed by the Governor of California and the Commander of the Eleventh Coast Guard District. The agreement is implemented in a series of "cooperative agreements" between the Eleventh Coast Guard District, the California Office of Spill Prevention and Response, and the California State Lands Commission.

Second, the regulations either cover subject matter that is not provided for under Coast Guard regulations or supplement federal oil spill prevention standards in ways that do not conflict with those standards. An example is the state regulation that requires the maintenance of an underkeel clearance of at least six feet above the sea floor at all stages of an oil

5. Cal. Gov. Code §§ 8670.2(l), 8670.17, 8670.17.2, 8670.18, 8670.22, 8670.28-8670.31; Cal. Pub. Res. Code §§ 8755, 8757, 8758.

transfer operation at an offshore marine terminal.[6] This regulation builds on California's experience with the Huntington Beach oil spill, where the *American Trader* punctured its hull by grounding on its own anchor during an attempted mooring at an offshore terminal. The Coast Guard's regulations do not include such a requirement.

Other States as well have adopted this twofold approach to oil spill prevention.[7] These programs employ a mutually beneficial form of cooperative federalism to work toward the common goal of both governments: preventing oil spills.

The sweeping field preemption that is argued for by petitioners would needlessly and uncritically foreclose the States from regulating in an area that implicates concerns at the heart of the States' police power. The proper analytical framework is that provided by conflict preemption, with its narrower, more discriminating assessment of state law to ascertain whether state law truly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

SUMMARY OF ARGUMENT

1. The field preemption arguments advanced by petitioners are so broad that they call into question the legitimacy of state-federal programs for cooperative enforcement of federal regulations designed to prevent oil spills from tank vessels. Under these programs, certain States have incorporated federal

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6. 2 Cal. Code Regs. § 2390(g); 14 Cal. Code Regs. § 844.12.

7. E.g., Alaska Stat. § 46.04.060; 18 Alaska Admin. Code §§ 75.005–75.037, 75400(a)(2), 75.425(e)(2)–(4), 75.445(k), 75.480; Me. Rev. Stat. Ann. tit. 38, §§ 541, 543, 544, 546, 560; 06-096 Code Me. R. ch. 600, §§ 1, 3, 4, 8, 10 (amended eff. Nov. 7, 1999); Or. Rev. Stat. §§ 468B.340, 468B.345-375, 468B.390; Or. Admin. R. §§ 340-047-0100, 0120, 0150, 0170; R.I. Gen. Laws § 46-12.5.1-1 et seq., § 46-12.6-1 et seq.; Wash. Rev. Code §§ 88.46.030, .040, .050, .120, .160, .170; Wash. Admin. Code § 317-21-010 et seq., § 317-40-010 et seq.

regulatory standards into state law, then proceeded to enforce those regulations using state inspection personnel. These state inspectors provide a valuable adjunct to the limited inspection capability of the Coast Guard. If state regulation in these fields is foreclosed by federal preemption, that could be interpreted to mean that States are not free to adopt such standards, even though they are identical to the federal standards. Such a result would leave enforcement authority solely with the Coast Guard, thereby impairing the effectiveness of the enforcement effort. Federal preemption law requires no such anomalous result. See *California* v. *Zook*, 336 U.S. 725 (1949).

2. Prevention of oil pollution lies at the heart of the police power of the States. States have adopted regulations aimed at preventing oil spills, some of which either fill voids in the federal regulations, or otherwise supplement federal efforts to prevent oil spills from tank vessels. Absent a conflict with federal regulation, such state regulation is not preempted. The principles of conflict preemption, not implied field preemption, govern here. The presumption is against any implied preemption of state regulatory efforts in this area.

Concerning the challenged Washington regulations, most of the regulations merely impose operational requirements that can readily be complied with by tank vessels entering Washington waters, and the remaining regulations, while they may have some minimal extraterritorial effects, do not go so far as to impair any discernible purpose or objective of Congress.

ARGUMENT

I. PETITIONERS' PREEMPTION ARGUMENTS THREATEN THE VIABILITY OF JOINT STATE-FEDERAL PROGRAMS FOR THE ENFORCEMENT OF FEDERAL REGULATIONS

A. Federal Oil Spill Prevention Standards Have Been Incorporated Into State Law for Purposes of Insuring Effective Enforcement

A principal purpose of the oil spill prevention programs of many States is to strengthen compliance with federal oil spill prevention measures by bringing to bear the additional personnel necessary to effectively enforce the federal standards. In many cases, state spill prevention regulations incorporate federal standards by reference.[8]

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8. E.g., 14 Cal. Code Regs. § 818.02(c)(1)(A) (vessel contingency plans; methods to reduce spills during transfer and storage operations; "[a]ny information developed in compliance with Title 33 CFR, Parts 154 and 156 may be substituted for all or part of any comparable prevention measures required by this subsection"); *id.*, § 843.1(b)(1) ("persons in charge" of offshore oil transfer operations must meet requirements set forth in 33 C.F.R. § 155.710); *id.*, § 843.8 (deck lighting "required under 33 CFR 155.790" must be observed); *id.*, § 844.4(a)(3) (vessel to be lightered must have on board International Oil Pollution Prevention Certificate required by 33 C.F.R. § 151); *id.*, § 845.1 (transfer operators involved in bunkering and lightering shall comply with applicable law, including the provisions of 33 C.F.R. Parts 154, 155, and 156); 2 Cal. Code Regs. § 2340(b)(1) (vessel transfer operations at marine terminals shall be conducted in accordance with procedures required by 33 C.F.R. § 155.720); *id.*, § 2340(c)(18) (prior to transfer, emergency means of shutdown for vessel required by 33 C.F.R. § 155.780 must be in place); *id.*, § 2375(b)(4) (Vessel Person in Charge (VPIC) of U.S.-documented vessel must hold license and indorsement issued under 46 C.F.R. Parts 10 and 13); *id.*, § 2375(b)(6)(A), (B) (VPIC of foreign tank vessel must have papers issued by the flag state authorizing service as ship's officer and hold a "Dangerous-Cargo Endorsement or Certificate issued by a flag state party to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW), or other form of evidence attesting that the VPIC meets the requirements of Chapter V of STCW as a PIC of the transfer of oil or liquid cargo in bulk"); 06-096 Code Me. R. ch. 600, § 4(A) (33 C.F.R. Parts 95 and 164 regarding navigation safety), § 4(B) (transfer personnel procedure and records), § 10 (33 C.F.R. Part 16 regarding drug and alcohol testing) (amended eff. Nov. 7, 1999); Wash. Admin. Code § 317-40-010 et seq. (bunkering personnel and operations must comply with 33 C.F.R. Parts 155 and 156 and 46 C.F.R. Parts 12, 15, and 35).

In California, the legislation further requires the state Administrator for Oil Spill Response to report to the Legislature concerning the adequacy of the Coast Guard's inspection program and to seek agreements with the Coast Guard to remedy any deficiencies. Cal. Gov. Code § 8670.18(c). An April 1992 report by the Administrator to the California Legislature identified shortcomings in the Coast Guard inspection program, concluding that the inadequacies were primarily due to a shortage of inspectors with adequate experience and training, and an over-reliance on the adequacy of overseas inspection of foreign-flagged tankers.[9]

Thereafter, on June 2, 1993, a Memorandum of Agreement

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9. The report drew many of its conclusions from reports of the federal government concerning the adequacy of the Coast Guard inspection program, primarily an October 1991 report of the General Accounting Office entitled, *COAST GUARD: Inspection Program Improvements Are Underway to Help Detect Unsafe Tankers*. The Administrator's report to the California Legislature summarized his conclusions as follows:

> "Coast Guard inspections have not always been reliable in detecting unsafe tankers. For tankers registered in the United States, such problems as too few inspectors, inexperienced inspectors, and limited inspection procedures have hampered the Coast Guard's inspection efforts. For foreign-flagged tankers, the Coast Guard relies heavily on inspections carried out under international agreements on behalf of the vessel's country of registration. However, these inspections have not always identified serious problems. Many reasons, including insufficient training for inspectors and efforts to reduce costs, may have limited the effectiveness of these inspections." Cal. Dept. of Fish & Game, Office of Oil Spill Prevention and Response, *Report to the Legislature: Evaluation of the Vessel Inspection Program of the United States Coast Guard* (April 1, 1992) 1.

was entered into by California's Governor and the Commander of the Eleventh Coast Guard District, providing for a cooperative program for oil spill prevention and response, including a joint vessel inspection program. As subsequently amended, the agreement provides, inter alia, that the parties will "cooperate and . . . coordinate their efforts in implementing and exercising their respective statutory and regulatory duties related to oil spill prevention and response"; consult with one another to "ensure state plans and policies for marine environmental protection are consistent with the [National Contingency Plan]"; cross-train "in each other's regulations and rules including the areas of inspection and response"; make their inspection records available to one another; promptly inform one another "of any situation or circumstance relative to a vessel whose condition or equipment may significantly increase the potential for an unauthorized discharge . . ."; "cooperatively examine pollution prevention and pollution response equipment aboard vessels and report noncompliance to the other party"; "cooperate to monitor transfer operations aboard tank vessels, including . . . dockside transfers . . . and lightering and bunkering operations"; schedule the monitoring of vessel transfer operations "to make best use of limited resources and avoid redundant oversight and disruptions to industry"; cooperate in the enforcement of requirements under the International Convention for the Prevention of Pollution From Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78); and, regarding the inspection of oil transfers between tank vessels and marine facilities, "utilize the resources of both Parties efficiently and effectively," carrying out inspections both individually and jointly.

"Cooperative agreements" subsequently executed between the parties further implement the basic Memorandum of Agreement: in furtherance of a "vigorous inspection and enforcement campaign," state inspectors "will act as agents of the COTP [Coast Guard Captain of the Port]" when conducting annual and periodic inspections of marine oil transfer facilities (MOTF), including monitoring of oil transfers; all

violations noted by state inspectors "will be summarized and passed to the local MSO [Coast Guard Marine Safety Office] at the end of each month"; with one modification, the Coast Guard Marine Safety Offices "will accept the [State Lands Commission's] Marine Terminal Oil Pipeline test procedures as listed in Title 2, Article 5.5 of the California Code of Regulations as an alternative test procedure to Title 33, Code of Federal Regulations, Part (sic) 156.170(c)(4) and (f)(1–2)"; regarding identification of high-risk vessels arriving in California that present a significant oil spill threat, the parties will coordinate "joint boarding and possible enforcement action"; the State Lands Commission's Marine Facilities Division (MFD) field office "will accept the lead role for the review of MOTF Operations Manuals," and the Coast Guard Marine Safety Office "may accept MFD review of MOTF Operations Manuals in lieu of conducting its own review of these manuals"; the Coast Guard MSO and state MFD field offices "will provide their schedules for internal training to one another and will, to the maximum extent feasible, afford opportunities for the other agency to attend and participate"; and, to reduce the likelihood of oil spills from substandard vessels at marine terminals, the Coast Guard MSO will provide to the state MFD field office a daily listing of vessels targeted for boarding, and the State will monitor the transfer operations of such vessels, providing a report of deficiencies to the Coast Guard.

Based on these agreements, the State of California has been able to shoulder a substantial share of the burden for facility and vessel inspections, with the result that there is now in place a much more effective program than existed previously for the enforcement of federal regulations.[10]

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10. As a result of the Memorandum of Agreement and cooperative agreements, the Coast Guard seldom, if ever, monitors an oil transfer at one of California's 54 marine terminals. Overall, State Lands Commission inspectors monitor 50 percent of the marine terminal transfers, whether by barge or tankship, that take place in the state. Because the compliance level of local oil barges tends to be a known quantity, the percentage of

B. Petitioners' Preemption Arguments Are So Overbroad as to Foreclose State Participation in Such Joint State-Federal Programs

The argument of the International Association of Independent Tanker Owners (Intertanko) goes far beyond the discriminating approach to preemption adopted in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978). Intertanko argues for implied field preemption of all matters covered by chapter 37 of Title 46 of the United States Code. While vaguely conceding some shoreside role for the States in oil spill prevention, Intertanko argues that there is absolutely no role for the States when it comes to "on-board, primary conduct of tank vessels or their crews," Intertanko Merits Br., at 11, and that state regulations are in all events barred when they "directly coincide with on-board subject matters and legislative purposes of federal statutes governing vessel safety and marine environmental protection," *id.*, at 16. In this area, Intertanko concludes, the States are left with pilotage and recreational boating safety and registration as the sole areas in which the police power may operate. *Id.*, at 17.

The federal government's brief argues for the same ultimate conclusion. Before the court of appeals, the Government advanced a narrower, more restrained conflict preemption argument, but the argument that has emerged before this Court is one that, if accepted, would have far broader preemptive impact. The Government contends that the States are completely foreclosed from regulating any matters within the scope of 46 U.S.C. §§ 3701–3719, which is the present-day successor to Title II of the Ports and Waterways Safety Act of 1972 (PWSA), Pub. L. No. 92–340, 86 Stat. 427. U.S. Merits Br., at 15, 24–26. According to the Government's

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monitored oil transfers involving tankships is significantly higher, at 67 percent, than the overall monitoring rate. State inspectors monitor 100 percent of oil transfers at marine terminals by tankships that are first-time callers or problem vessels.

brief, the States were ousted from regulating tank vessel operations as far back as 1936, when Congress passed the Tank Vessel Act, Pub. L. No. 74–765, 49 Stat. 1889. U.S. Merits Br., at 22–23. As does Intertanko, the federal government concedes the States some role in regulation of port vessel traffic, which is covered by Title I of the PWSA, but only until the Coast Guard acts. *Id.*, at 15, 26–28.

As far as appears, these arguments would leave no role for the States in the areas assertedly preempted, even if that role were simply one of adopting federal regulations as state law and cooperating with the Coast Guard in a joint enforcement program of the type detailed above. Such cooperative enforcement efforts closely involve the States in enforcing federal standards regarding tank vessel equipment, maintenance, personnel qualifications, manning, and operations (see footnote 8, *supra*)—the very aspects of federal tank vessel regulation that petitioners say are off-limits to the States. This Court's precedents do not forestall such mutual state-federal cooperation.

II. THE PREEMPTION DOCTRINE DOES NOT PREVENT THE STATES FROM ADOPTING AS THEIR OWN THE CONTENT OF FEDERAL STATUTES OR REGULATIONS

States have frequently chosen to incorporate federal regulatory provisions into state law or to make violation of federal law the subject of state sanctions. See *California* v. *Zook*, 336 U.S. 725 (1949). Without more, such borrowing of federal law is not foreclosed by principles of federal preemption. *Id.*, at 730–735; *Asbell* v. *Kansas*, 209 U.S. 251, 257–58 (1908). Quoting from the Court's opinion in *Zook*:

> "The question is whether Congress intended to override State laws identical with its own when it, through the Interstate Commerce Commission, regulated share-expense passenger automobile transportation, or whether it intended to let State laws stand. While the statute says

> nothing expressly on this point and we are aided by no legislative history directly in point (footnote omitted), *we know that normally congressional purpose to displace local laws must be clearly manifested.*" (Italics added.) 336 U.S., at 733.

Of particular relevance to cooperative state-federal enforcement programs aimed at preventing oil spills is the Court's statement in *Zook* that, "[W]hen state enforcement mechanisms so helpful to federal officials are to be excluded, Congress may say so . . . ." *Id.*, at 732. And further: "It is difficult to believe that the I.C.C. intended to deprive itself of effective aid from local officers experienced in the kind of enforcement necessary to combat this evil . . . ." *Id.*, at 737.

It is similarly difficult to believe that preemption doctrine would require the Coast Guard to reject the type of state aid that it has welcomed in the Memorandum of Agreement and cooperative agreements outlined above. As *Zook* makes clear, the Supremacy Clause requires no such anomalous result.

III. IN THE EXERCISE OF THEIR POLICE POWER, THE STATES MAY REGULATE IN THE AREA OF OIL SPILL PREVENTION, PROVIDED ONLY THAT THEIR REGULATIONS DO NOT CONFLICT WITH THE OBJECTIVES OF CONGRESS

The overbroad preemption arguments made here also threaten the second area of state contribution toward the common goal of preventing oil spills—that involving state regulations that either cover subject matter that is not provided for under Coast Guard regulations or supplement federal oil spill prevention standards in ways that do not conflict with those standards.

The California regulations also offer examples of this type of state regulation. For instance, regarding several matters that are not covered by Coast Guard regulations, California

regulates oil transfer operations at offshore marine terminals,[11] onshore marine terminals,[12] and marine terminals generally.[13] California also supplements Coast Guard regulations in the areas of bunkering and lightering.[14]

These various regulations further, rather than conflict with, the congressional purpose of preventing oil spills. Moreover, all of them have a local focus; none implicate the concern with interstate and international uniformity that informed the

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11. E.g., 2 Cal. Code Regs. § 2390(g) and 14 Cal. Code Regs. § 844.12 (requiring a minimum underkeel clearance of six feet above the sea floor at all times during transfer operations at offshore marine terminals); 2 Cal. Code Regs. § 2390(b)(1) and 14 Cal. Code Regs. § 844.9 (requiring a tug or tugs to be standing by during mooring and unmooring operations); 2 Cal. Code Regs. § 2390(c)(2), (d)(2) and 14 Cal. Code Regs. § 844.9 (requiring presence of mooring master and assistant mooring master onboard tank vessel during mooring and unmooring).

12. E.g., 2 Cal. Code Regs. § 2330(b)(3)(C)(4) (requiring that a maximum transfer rate be established if any part of the transfer rate is to be by gravity flow); *id.*, § 2341(c) (requiring that each cargo hose string or vapor control hose used during transfer have either an insulating flange joint or a single length of non-conducting hose to ensure electrical discontinuity between the terminal and vessel).

13. E.g., 2 Cal. Code Regs. § 2330(b)(2) (requiring the persons in charge of the vessel (VPIC) and the terminal (TPIC) to hold a pre-transfer conference to insure a clear mutual understanding and agreement concerning applicable transfer information and procedures); *id.*, § 2340(b)(2) (requiring VPIC and TPIC, if previously agreed transfer procedures are to be changed, to stop transfer and agree on changes before they proceed); *id.*, § 2340(c)(28)(A), (B) (requiring vessel to have ability to move from berth within 30 minutes, either under own power or with tug assistance); *id.*, § 2340(c)(29)(A) (requiring vessel to be capable of rigging emergency tow wires forward and aft, with ends not greater than five feet above the water); *id.*, § 2380(d)(1)(B) (requiring a bolt in every hole when a bolted connection is used for transfer operations).

14. E.g., 14 Cal. Code Regs. §§ 844(a), 844.5(a) (providing that bunkering and lightering requirements are in addition to those at 33 C.F.R. Parts 155 and 156, which are incorporated by reference); *id.*, §§ 844(c), 844.5(c) (requiring boom deployment or capability to deploy boom during transfer; not required under Coast Guard regulations).

conclusion in *Ray* v. *Atlantic Richfield Co.*, *supra*, 435 U.S., at 163–64, that tanker design and construction standards necessarily must emanate solely from the federal government.

Despite the localized focus of such regulations and despite their lack of any extraterritorial impacts that would conflict with implicit congressional concerns with international uniformity, such as were identified in *Ray*, petitioners' preemption arguments would nonetheless foreclose such state regulation because the state rules relate to "on-board vessel operations." Nothing in the subject statutes or regulations warrants such a gross displacement of the police power of the States.

A. The Power to Prevent Oil Spills, Whether From Tank Vessels or Any Other Source, Is Within the Traditional Police Power of the States, and May Not Be Taken From the States Absent a Clear Expression of Intent by Congress

This Court has recognized that the prevention of oil pollution is at the core of the police power. In *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973), the Court rejected an argument that would have allowed federal admiralty jurisdiction to "swallow most of the police power of the States over oil spillage—an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent." *Id.*, at 328–29. The Court was acutely aware of the harmful impacts that oil spills can have on a State's recreational and natural resources and upon the livelihood of its citizens: "A State may have public beaches ruined by oil spills. Shrimp may be destroyed, clam, oyster, and scallop beds ruined and the livelihood of fishermen imperiled." *Id.*, at 332–33. Following a discussion of *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960) (approval of ship's boiler pursuant to federal vessel safety statute does not preclude enforcement of city ordinance against smoke pollution caused by boiler), the Court concluded: "It follows,

a fortiori, that sea-to-shore pollution—historically within the reach of the police power of the States—is not silently taken away from the States by the Admiralty Extension Act, which does not purport to supply the exclusive remedy." *Id.*, at 343.

The Court also observed in *Ray* v. *Atlantic Richfield Co.*, *supra*, that "enrolled and registered vessels must conform to reasonable, nondiscriminatory conservation and environmental protection measures imposed by a State (internal quotation marks omitted)," and that, "Of course, that a tanker is certified under federal law as a safe vessel insofar as its design and construction . . . does not mean that it is free to ignore otherwise valid state or federal rules or regulations that do not constitute design or construction specifications." 435 U.S., at 164, 168–69.

Further, the Court has been reluctant to conclude that, merely by implication, Congress has deprived the States of regulatory authority over core police power concerns, even in areas with a heavy federal regulatory presence: "When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess." *Kelly* v. *Washington*, 302 U.S. 1, 14 (1937) (federal regulation of motor-driven tugboat safety not so comprehensive as to exclude supplemental state safety regulations regarding same vessels); cf. *Askew*, *supra*, 411 U.S., at 343. To the same effect is *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 605 (1991): "When considering pre-emption, we must start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (Internal quotation marks omitted.) Accord, *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.").

Nor has it mattered that local police regulations have affected, even burdened, interstate and international seaborne com-

merce. For centuries, foreign vessels have complied with local regulations unique to each of the world's ports. Local pilotage requirements are a principal example. See *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299, 319–20 (1851) (local pilotage requirement; no need for national uniformity). These requirements still obtain; for instance, an oil tanker of foreign registry approaching the Golden Gate, whether it be carrying crude oil from Indonesia or Venezuela or the Middle East, must still take on a local pilot. Nor are such local pilotage requirements dependent for their legitimacy on federal legislation. See *Cooley*, *supra*. Such local regulation is simply a fact of commercial life for vessels calling at ports around the globe.

B. State Oil Spill Prevention Measures That Do Not Conflict With Federal Law May Co-Exist With Federal Regulatory Standards

Conceptually, local pollution control measures regarding tank vessels are no different from the local pilotage requirements sustained in *Cooley*. Just as do local pilotage requirements, such local rules may co-exist with related regulations of the national government concerning "vessel operations," so long as they do not run contrary to a clearly discernable congressional intent to impose a uniform national rule and so long as they do not otherwise conflict with federal law. There is no sufficient basis in federal statutes or regulations for implying a congressional intent to preempt the field of "vessel operations."

The field preemption argued for by petitioners contrasts with the more careful and discriminating case-by-case analysis that this Court has traditionally employed when examining assertions that state exercise of the police power has been either preempted by federal regulation or displaced by the dormant Commerce Clause or the need for "uniformity" in admiralty law. State law "should be pre-empted . . . only to the extent necessary to protect the achievement of the aims of

the federal law, since the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted." (Internal quotation marks omitted.) *De Canas* v. *Bica*, 424 U.S. 351, 357, n. 5 (1976), quoting *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 127 (1973).

Accordingly, a more sure-footed approach to the preemption issue presented here is to test each of the regulations against the following considerably narrower standard: does the state rule conflict with a federal statute or regulation? That is what this Court did in *Ray* v. *Atlantic Richfield Co.*, *supra*; it eschewed a field preemption analysis in favor of a particularized search for a true conflict between the state and federal regulations.

That was also the position of the United States before the Ninth Circuit in this case, where it advanced a narrow conflict preemption argument. U.S. Ninth Circuit Br., at 2–3, 21, 23, 34. Below, in explaining the application of conflict preemption to the regulations at hand, the federal government conceded that "exercises of state police power to prevent *tanker operations* from causing pollution are often not preempted (italics added)," and that several Washington rules "do not interfere in any way with federal statutory provisions," concluding that "we see no reason why they should be considered preempted." *Id.*, at 22, 54–55.[15]

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15. The concession below by the federal government concerning the Washington regulations that were not preempted reads as follows:

> **"4. Navigation and Engineering Practices**
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> "By contrast, Washington Rules 317-21-205 and 317-21-210 raise no serious preemption issues.
>
> "Section 205 requires tank vessels in navigation in state waters to record positions every 15 minutes, to write a comprehensive voyage plan before entering state waters, and to make frequent compass checks while under way. See CR 106 Exh. 4(A), at 1–9 (*reprinted at* ER Tab 1). Section 210 mandates that tank vessels in state waters follow specified engineering and monitoring practices, such as that standby generators must be running and immediately available to

There is no assertion here by either petitioner that it is impossible to comply with both the Washington rules and the federal regulations. That leaves the alternative prong of conflict preemption: whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ray*, *supra*, 435 U.S., at 158, quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Accordingly, the inquiry should focus on two issues. First, is the state law inconsistent with a need for uniformity that is either obvious on its face or that has been clearly expressed by Congress? Second, does state law impair the accomplishment of congressional objectives? If the answer to both of these questions is no, then exercise of the State's police power is not foreclosed.

1. Considerations Regarding Uniformity

A concern with the practical need for uniformity regarding certain aspects of interstate and foreign commerce underlies much of the Court's jurisprudence concerning preemption, the Commerce Clause, and admiralty law. The Court has often focused on the extraterritorial impacts of a challenged state

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assume the electrical load for vessels not equipped with automatic standby switching gear. *Id.* at 1–17.

"In neither instance do these requirements go beyond international standards or conventions to which the U.S. is a party. They also do not interfere in any way with federal statutory provisions. Thus, we see no reason why they should be considered preempted. See also 61 Fed. Reg. 1052, 1080 (1996) (states may impose planning requirements for tank vessels so long as they do not preclude compliance with federal requirements).

". . . . . .

". . . [W]e believe that a remand is necessary so that the district court can consider the various Washington standards individually and determine how they relate to the existing federal and international schemes, using an appropriate preemption standard." U.S. Ninth Circuit Br., at 54–55.

regulation, as balanced against the strength of the police power concerns in which the state regulation is grounded, and has been particularly sensitive to the impracticalities engendered by state regulations that impose physical constraints on the operation of commerce that extend far beyond the borders of the State whose regulation is at issue. See, e.g., *Ray*, *supra*, 435 U.S., at 160–68 and n. 15 (preemption; state regulations prescribing standards for design and construction of tank vessels ruled invalid); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 772–75 (1945) (Commerce Clause; state statute limiting train lengths ruled invalid because of extraterritorial impacts on railroad operations in adjacent States); *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520, 529–30 (1959) (Commerce Clause; Illinois statute requiring contoured mudflaps on trucks and banning mudflap design that was legal in 45 other States and affirmatively required in Arkansas held invalid); *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 180–82, 196 (1938) (Commerce Clause; state statute prohibiting use of state highways by trucks exceeding prescribed width and weight limitations upheld).

Regarding preemption, "[i]n areas of the law not inherently requiring national uniformity (footnote omitted), . . . state statutes, otherwise valid, must be upheld unless there is found such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field." (Internal quotation marks omitted.) *Head* v. *New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 430 (1963), quoting *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 141 (1963); cf. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 373 (1959) (concern with uniformity in federal maritime law "still leaves the States a wide scope").

As applied to ships, state design and construction standards present the type of physical constraint on the conduct of interstate and foreign commerce that this Court has found must yield to the need for uniformity. *Ray*, *supra*; *Kelly* v. *Washington*, *supra*, 302 U.S., at 14–15 (1937). The problem

is that once a ship is constructed, it is simply impracticable to make structural alterations on a voyage-by-voyage basis to comply with differing or conflicting state design or construction standards.

Shipboard equipment, which tends not to be so inextricably integrated into a vessel's primary design and construction, presents a different issue, particularly regarding portable equipment, such as booming, which can be deployed during lightering operations to contain spills.[16] No issues concerning the legitimacy of state equipment requirements for tank vessels are presented here.[17]

Of the regulations that are now presented for review, many have absolutely no extraterritorial impact at all, and the few that arguably do have extraterritorial impact do not present the practical difficulties that rules concerning design and construction do. And, as the federal government conceded below (see footnote 15, *ante*), many of Washington's regulations, although they unquestionably relate to "vessel operations," are purely local in their application and have no extraterritorial impact at all. Some examples of these latter regulations are those requiring position recording, compass checks, pre-arrival systems testing, and preparation of voyage plans prior to entry into state waters. See Wash. Admin. Code § 317-21-205(1), (2), § 317-21-215.

2. Principles of Conflict Preemption

Once the uniformity issue is assessed, what remains is a

16. States such as Alaska, California, and New Jersey, for instance, require booming during lightering. 18 Alaska Admin. Code § 75.025(b); 14 Cal. Code Regs. § 844.5(c); N.J. Admin. Code § 7:1E-2.7.

17. The court of appeals invalidated Washington's regulations insofar as they required tankers to be equipped with two separate radar systems, global positioning system receivers, and an emergency towing system. Because Washington chose not to seek review of this determination, there is no issue before the Court concerning state equipment requirements for tank vessels.

review for actual conflicts between state and federal regulations. Here, a number of well established principles apply. First, because the two governments are pursuing the common goal of preventing oil spills by regulating the same or related subject matter, one cannot argue that state oil pollution regulations run contrary to the overall "purposes and objectives of Congress." Nor does coincidence of objectives establish preemption. *California* v. *Zook*, *supra*, 336 U.S., at 730–35; *Florida Avocado Growers* v. *Paul*, *supra*, 373 U.S., at 142. Second, the States are free to fill in voids or gaps in federal regulations. *Kelly* v. *Washington*, *supra*, 302 U.S., at 10–11; *Reid* v. *Colorado*, 187 U.S. 137, 149, 150 (1902); *Savage* v. *Jones*, 225 U.S. 501, 531–33 (1912). Third, a *per se* case for federal preemption cannot be made simply by arguing, as does Intertanko, that the state rules "differ" or "diverge" from the federal regulations. Necessarily, when a State regulates in common with the federal government concerning a given subject matter, the regulation will differ, unless the regulation is identical. The salient question is whether the differences amount to a conflict. Fourth, there is no general bar to state regulations that supplement federal regulations, even if those regulations impose stricter standards. *Zook*, *supra* (state law imposed stricter criminal sanctions for same conduct). Fifth, the comprehensive scope of the federal regulations is not alone enough to establish preemption. *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 415 (1973). Finally, "[i]n . . . areas of coincident federal and state regulation, the teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." (Internal quotation marks omitted.) *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 130 (1978).

State oil spill regulations should be tested using the foregoing principles of conflict preemption, not the broad categorical approach of field preemption, which precludes the States from supplementing federal regulations in ways that could help achieve the common goal of oil spill prevention.

C. In Enacting 46 U.S.C. §§ 3701–3719, Congress Did Not Implicitly Intend to Foreclose the States From Regulating Tank Vessel Operations to Prevent Oil Spill Pollution

Petitioners base their field preemption argument principally on two grounds: that the text of the Ports and Waterways Safety Act and the subsequent manner of its codification evidence a congressional intent to preempt state regulation of most aspects of tank vessel regulation, including vessel "operations," and that the need for uniformity implicit in certain international conventions concerning vessel safety and marine pollution by vessels entirely prevents the States from regulating in these areas. Neither basis for the preemption argument is supportable.

Both petitioners place great weight on the "may"–"shall" difference in the authorizations to the Secretary to adopt regulations in Titles I and II, respectively, of the Ports and Waterways Safety Act. The relevant language is now contained in 33 U.S.C. § 1223 and 46 U.S.C. § 3703, respectively. The argument is that when Congress used the word "shall" regarding the issuance of regulations on matters covered in Title II, that evidenced congressional intent to oust the States from regulating regarding any of those matters. Intertanko Merits Br., at 21–25; U.S. Merits Br., at 24–26. Such a sweeping preemption by Congress of state regulatory authority cannot reliably be inferred from such a thin textual basis. The words may reflect nothing more than a congressional judgment about the relative necessity of regulations in the respective areas covered. The words reveal nothing at all about the intent of Congress concerning preemption of state power to regulate in these same fields.

Likewise, petitioners' focus on the Secretary's power (delegated to the Coast Guard) to issue regulations on various matters, including the "operation" of vessels, 46 U.S.C. § 3703, isn't persuasive. 33 U.S.C. § 1223, involving the "permissive" regulatory authority of the Coast Guard, and to

which petitioners ascribe quite different preemptive effects, see U.S. Merits Br., at 26–28; Intertanko Merits Br., at 22–23, also empowers the Coast Guard to regulate vessel "operation" and the "operating" requirements, conditions, characteristics, and capabilities of vessels. 33 U.S.C. § 1223(a)(1), (a)(4)(C), (D). Section 1223, no less than 46 U.S.C. § 3703, provides for regulation of the "on-board vessel operational procedures" that Intertanko says are completely off-limits to the States. Intertanko Merits Br., at 40. There is thus textual spillover between the provisions of the two codes, destroying any artificial attempt to mutually seal off their respective subject matters for purposes of furthering a preemption argument.

Nor, finally, is there a basis in certain international conventions for concluding that Congress intended to preempt the States from regulating tank vessel operations to prevent oil spill pollution. The argument that international marine commerce requires certain uniform standards to function effectively makes sense regarding certain regulatory requirements, such as those pertaining to vessel design and construction, which can have profound extraterritorial impacts. The argument has little persuasive force, however, regarding state-imposed operational requirements that tank vessels can readily comply with. See the discussion of uniformity under heading III.B.1 above. Further, Congress has clearly determined that any preference for uniformity has limits. See 46 U.S.C. § 3703(a) (providing that the Secretary "may prescribe regulations [for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels] that exceed standards set internationally"). Moreover, diversity is reflected in the varying local requirements for pilotage, and in the varying state requirements regarding the level of financial responsibility that must be established by U.S. and foreign-flagged tank vessels, which is sanctioned by section 1018 of the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484, 33 U.S.C. § 2701 et seq. The broad uniformity referred to by petitioners does not

exist, nor, in most instances, is it necessary.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully request that the decision of the court of appeals be affirmed.

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IN THE

Supreme Court of the United States

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),
Petitioner

and

UNITED STATES OF AMERICA,
Petitioner

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTERESTS OF THE *AMICI CURIAE* WASHINGTON COUNTIES [1]

Even before political boundaries were drawn in the Pacific Northwest the people who lived in what are now San Juan, Clallam, Jefferson and other Washington counties drew their sustenance from the salt waters of Puget Sound and the Washington Coast. The location of these counties makes the people who live, work and play here most affected by the outcome of this case.

Each of the *Amici* counties borders the salt water of Washington State. Within Puget Sound, each county's boundaries extend to the Canadian border or to the middle of adjoining waterways such as the Strait of Juan de Fuca, Rosario Strait, Haro Strait, and Boundary Pass.[2] Along the Washington coast, each county's boundary extends three miles beyond the land.[3] San Juan County, an archipelago of 172 named islands, is located in the geographic center of Puget Sound, surrounded by shipping lanes which channel tanker traffic between the mainland United States and Vancouver Island, Canada. These are the same shipping lanes used by oil tankers bound for Ports in Skagit and Whatcom counties, and Vancouver, British Columbia, the largest shipping port in Canada. Other islands are spread throughout the shipping lanes of lower Puget Sound as far south as Seattle and Tacoma.

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[1] This Amici Curiae brief is submitted by the authority of the law officers (Prosecuting Attorneys) of the respective counties pursuant to Court Rule 37(4). No counsel for a party authored this brief in whole or in part. No person or entity other than the Amici Curiae has made a monetary contribution to the preparation or submission of this brief.

[2] See, e.g. R.C.W. § 36.04.280 (San Juan County); and .050 (Clallam County); and .160 (Jefferson County).

[3] See *United States v. Alaska*, 521 U.S. 1, 5, 117 S.Ct. 1388, 1392, 138 L.Ed.2d 231 (1997).

The people in these Washington counties have "local knowledge" of the waters and the very real hazards to navigation. They and their local elected officials have been and will be the first to respond to any oil spill that occurs. It is their beaches which will be covered with oil; their wildlife which will be killed; and their way of life which will be harmed by an accident in Puget Sound or the Straits. The geographic location of these counties gives them a special perspective on the issues before the Court. It is this unique perspective which leads the counties to support the regulations by the State of Washington to reduce the likelihood of an oil spill. As will be evident, this short statement does not merely repeat arguments of the parties before the court.

ARGUMENT

For thousands of years the Indians of the Northwest Coast of Washington lived off the bounty of the waters of the Straits of Georgia and Juan de Fuca, and Puget Sound. The waters teemed with salmon, rockfish and cod. The shorelines of hundreds of islands were thick with clams, oysters and mussels that lived on the submerged mountains whose tops poke through the surface of this inland sea.[4]

In 1792, Captain George Vancouver, who was no stranger to beauty having just come from the South Seas, sailed into these waters in his ship *Discovery* and described the paradise he found:

> . . . The country before us exhibited everything that bounteous nature could be expected to draw into one point of view. As we had no reason to imagine that this country had ever been indebted for any of its decorations to the hand of man, I could not possibly believe that any

[4] Joint App. 173-179. Affidavit of Morris W. Barker.

> uncultivated country had ever been discovered exhibiting so rich a picture.[5]

These shorelines, nurtured by the waters of the Straits and the Sound, are no less beautiful or alluring today. Hundreds of miles of beaches in Clallam, Whatcom, Skagit and Jefferson counties protectively encircle the 172 named islands of San Juan County, the only county in the contiguous United States composed entirely of islands.

The sea and the web of life it supports are the heartbeat of the islands and Puget Sound. Fishing has been an integral part of life for the people of the area. Small sailing vessels fished the waters as early as 1850. Ships would pack their catch in salt and then sell it in Seattle or Victoria, Canada. Soon fish salting plants, and later, numerous canneries were operating in the area. But fishing, especially salmon fishing, has declined because fewer and fewer fish have become more difficult to catch.[6]

Today, visitors come by the millions from all over the world to drink in the beauty.[7] They paddle kayaks along the unspoiled shorelines, watch pods of Orca whales making daily trips up and down Georgia Strait or simply gaze in awe at the scenery from the decks of the Washington State Ferries, which provide the only public link between the Islands and the mainland. Like the original Native Americans, they savor the food that comes from the sea: Dungeness crab, five kinds of salmon, rockfish, abalone and shrimp are only some

[5] May 2, 1792 Journal entry of Captain George Vancouver, *Vancouver's Discovery of Puget Sound*, by Edmond S. Meany, Binford & Mort, Publishers (1957).

[6] On March 2, 1999, the U.S. Fish and Wildlife Service issued a final rule listing the Chinook Salmon in Puget Sound as threatened and other populations as endangered. 64 Fed. Reg. 41835 (1999).

[7] Joint App. 180-190. Affidavit of Susan Zemek.

of the bounty which makes its way to tables and restaurants throughout the region and the world.[8]

Not only visitors and residents seek rejuvenation and sustenance from these surroundings. Five million birds of 125 species come here to feed, court and rest on their journeys to wintering and breeding grounds.[9] Dungeness Spit is just one of three National Wildlife Refuges within the Department of Interior which exist to protect the millions of nesting, wintering and migrating marine birds. Congress has also recognized the national value of the region by providing for the designation of the Olympic Coast National Marine Sanctuary,[10] and directing the National Oceanic and Atmospheric Administration to evaluate the suitability of other portions of the Puget Sound for inclusion in the Marine Sanctuary system.[11] It is no coincidence that the University of Washington has chosen the San Juan Islands as the place to locate their internationally known Marine Laboratories.

The people who live here are tenacious, protective and passionate. Protection of the natural resources is seen as a duty and an obligation, to their self, their state and their Nation.[12] The historical roots of this obligation trace their way back to the now famous warning of Chief Seattle in 1854 when the Suquamish tribe gave up its claim to the land and waters of Puget Sound:

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[8] Joint App. 173-179. Affidavit of Morris W. Barker.

[9] Joint App. 161-172. Affidavit of Dennis Paulson.

[10] P.L. 100-627 and 59 Fed. Reg. 24586 (1994), 15 CFR Part 925.

[11] 54 Fed. Reg. 41481 (1989).

[12] For example, in 1977, Washington Senator Warren Magnuson authored amendments to the Marine Mammal Protection Act (P.L. 95-136) which recognized the "fragile and important" national asset of natural resources and the waters of Puget Sound and acknowledged the threat to it by ships carrying crude oil in bulk.

This we know: All things are connected like
the blood that unites us,
We did not weave the web of life,
We are merely a strand in it.
Whatever we do to the web, we do to ourselves.

We love this earth as a newborn loves
its mother's heartbeat.
If we sell you our land, care for it as we have cared for it.
Hold in your mind the memory of the land as it is
when you receive it.
Preserve the land and the air and the rivers for your
children's children and love it as we have loved it.[13]

* * *

The State of Washington is the steward for this land and these waters. It is the State and the people of the State along with our natural resources which are imperiled when a tanker runs aground or spills fuel or oil into our waters. This threat is real. Navigation in Puget Sound can be treacherous.[14] Persistent fog, wind, waves, strong currents, long hours of darkness and narrow channels such as Guemes Channel in Skagit County[15] make navigation difficult, and magnify the risk when something goes wrong.

In 1985, the tanker *Arco Anchorage* spilled 239,000 gallons at Port Angeles Harbor in Clallam County.[16] Last year, the Liberian tanker *New Endeavor* and the Italian tanker *Angelo D'Amato*, with combined cargoes of approximately 36 million gallons of oil sent out distress signals at the same

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[13] Chief Seattle's speech during 1854 Treaty Negotiations, as adapted by Susan Jeffers in *Brother Eagle, Sister Sky*, Dial Books (1991).

[14] Joint App. 124, Affidavit of Stanley I Norman, Commander, United States Coast Guard (Retired) and Program Director for Policy and Planning at the Washington State Office of Marine Safety (OMS) who concludes that "Puget Sound is considerably more difficult to navigate than Prince William Sound where the Exxon Valdez disaster occurred."

[15] Joint App. 122-123, Affidavit of Stanley I. Norman.

[16] Joint App. 65, Affidavit of C. Jonathan Neel.

time. Though carrying proper charts may seem like a common sense rule, in July 1999 the Maltese tanker *Parnar* and the Liberian tanker *Davids Siketross* entered the Washington waters without appropriate nautical charts, thereby jeopardizing the pristine shores of the State of Washington, San Juan, Clallam, Jefferson and other counties. These same tankers have only profits to be made from the transportation of their oil to refineries. It is the people of the Sound who bear the total risk of having their homeland destroyed.

This is the backdrop that provided the political and legal support for the Washington rules that provide the "Best Achievable Protection" for Puget Sound and the Washington Coast.[17] These rules do not erect a gate at the opening to the Juan de Fuca Strait. Rather, these rules adopt reasonable requirements to protect the State's irreplaceable resources. The State has acted in response to authority from Congress.[18] Congress knows well how to grant authority to the states in the area of maritime commerce and knows well how to take that right away.[19]

The citizens of Washington should not have to wait until there is an *Exxon Valdez* tragedy in Puget Sound for the next round of federal rules or agreements enhancing the safety of tanker traffic. The Washington rules provide a huge protection for the *Amici* Washington counties, their citizens, and the citizens of the state of the Nation.

The paradise "discovered" by Captain Vancouver in 1792 was not "indebted for any of its decorations to the hand of man." The Washington rules seek only to ensure that no

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[17] Wash. Admin. Code Chapter 317-21.

[18] OPA 90 section 1018(a) and (c), State App. at 46a-47a, 33 USCA section 2718.

[19] See, e.g. *Ray v. Atlantic Richfield Co.* 435 U.S. 151, 98 S. Ct. 988, 55 L. Ed.2d 170 (1978).

"decoration of the hand of man" will ever desecrate the waters that have inspired and sustained people since long before Captain Vancouver sailed the straits and Puget Sound.

CONCLUSION

This Court should affirm the Ninth Circuit and uphold the rules that provide for the best achievable protection in tanker operations.

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Dated: November 19, 1999

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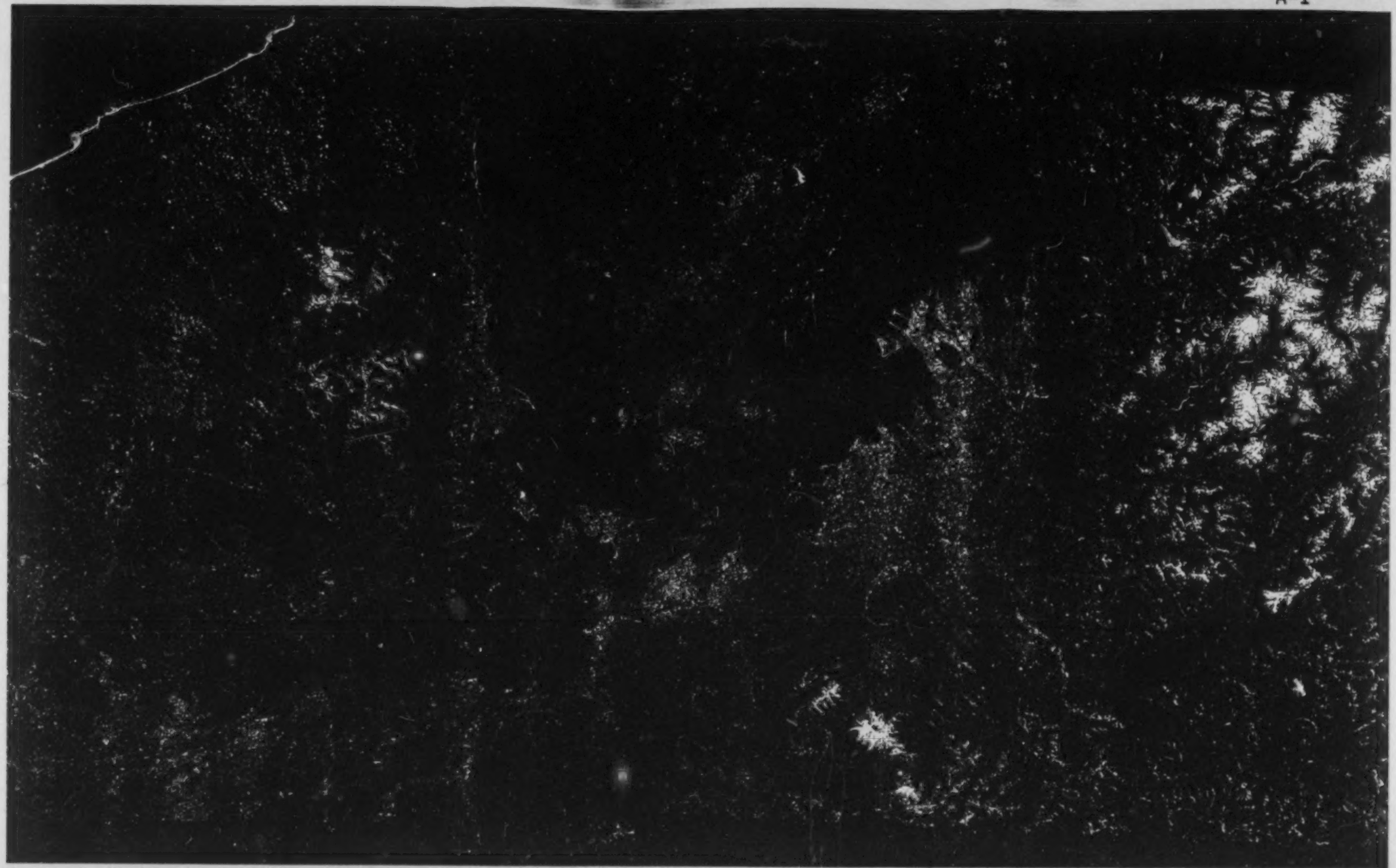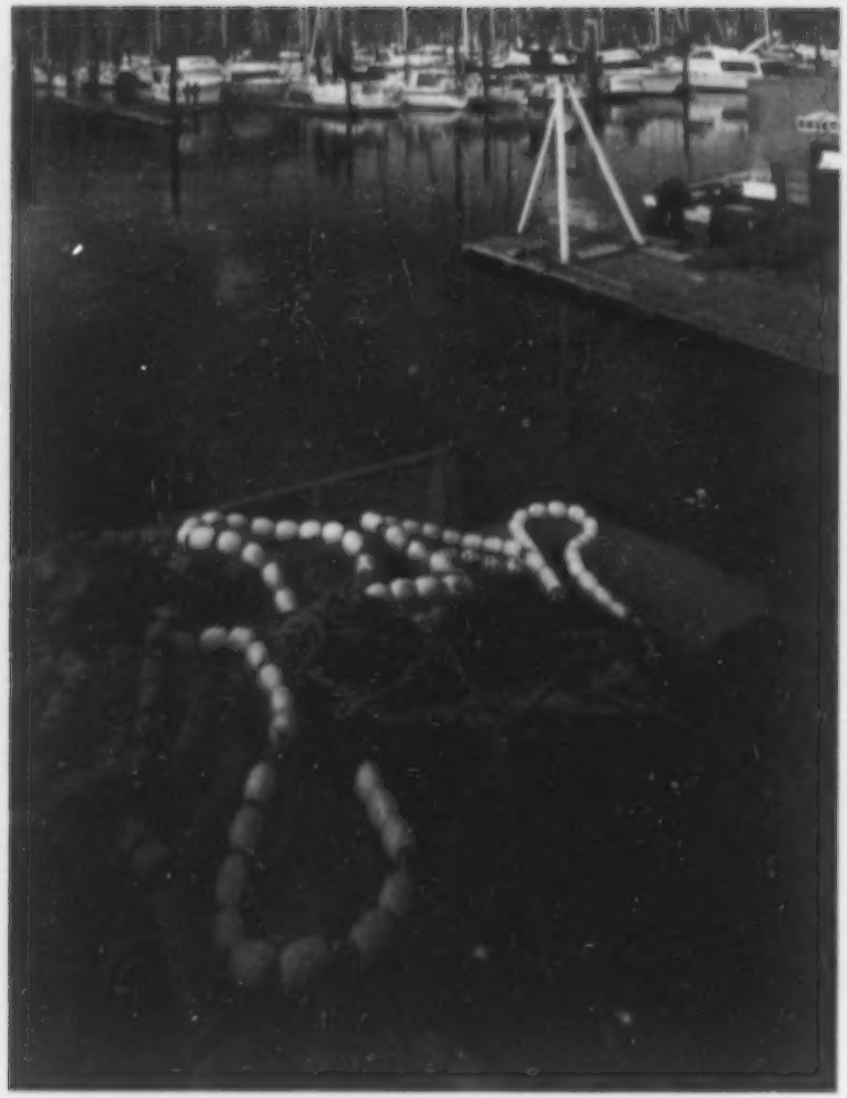
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